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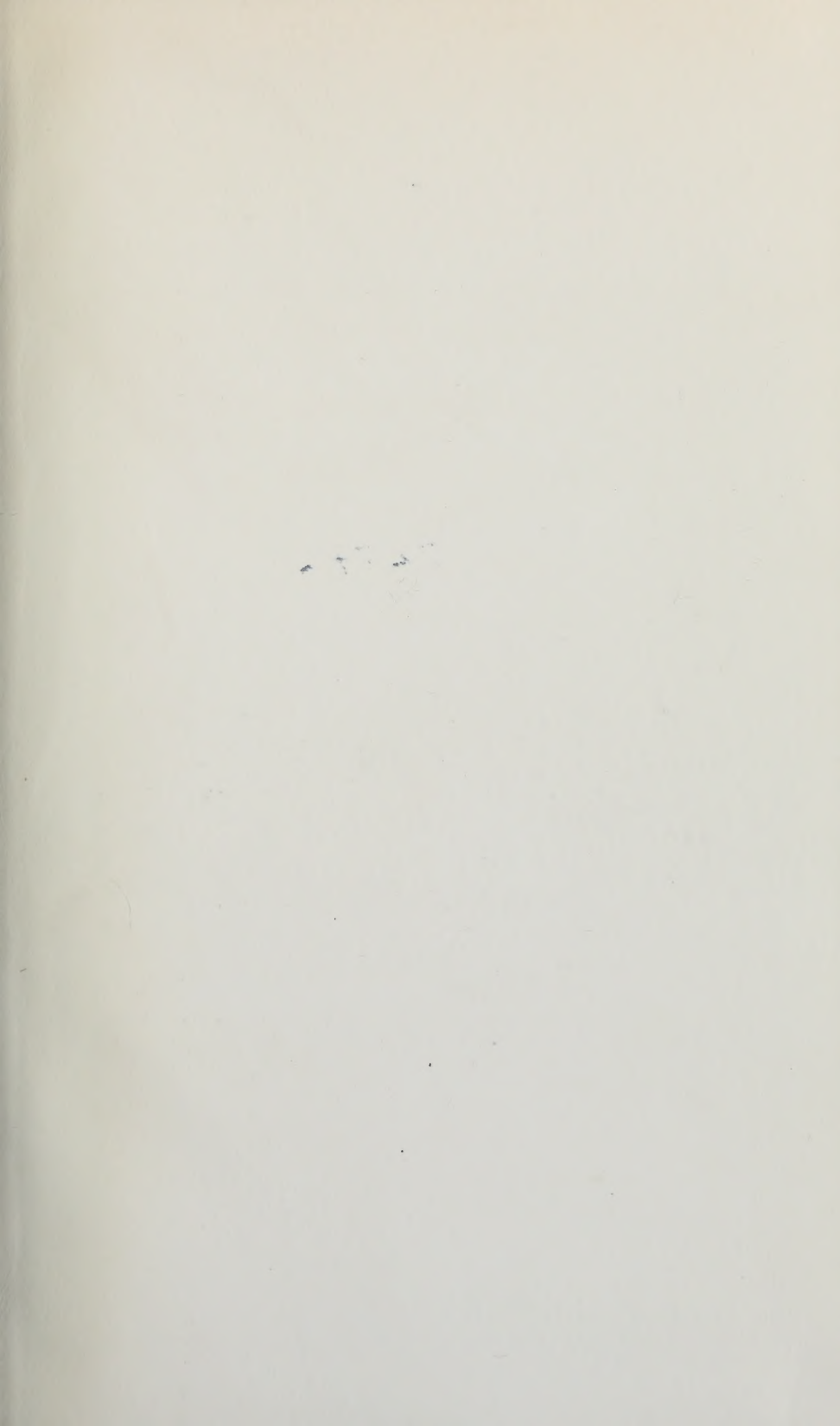
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15,273<sup>2</sup>

No. 13140

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**United States  
Court of Appeals**  
for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,  
Petitioner,

VS.

HOWELL CHEVROLET COMPANY, a Corpora-  
tion,  
Respondent.

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**Transcript of Record**

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**Petition for Enforcement of Order of the  
National Labor Relations Board**

**FILED**

**JAN - 9 1952**





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**Court of Appeals**  
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NATIONAL LABOR RELATIONS BOARD,

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**Petition for Enforcement of Order of the**  
**National Labor Relations Board**





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles (14), Calif.,  
For Respondent.



United States of America  
Before the National Labor Relations Board  
Twenty-First Region

Case No. 21-CA-794

In the Matter of

HOWELL CHEVROLET COMPANY,  
and  
INTERNATIONAL ASSOCIATION OF MA-  
CHINISTS, DISTRICT LODGE No. 727.

COMPLAINT

It having been charged by International Association of Machinists, District Lodge No. 727, herein called Lodge 727, that Howell Chevrolet Company has engaged in and is engaging in unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, Public Law 101—80th Congress, First Session, hereinafter called the Act, the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-First Region designated by the Board's Rules and Regulations, Series 5, Section 102.15, hereby issues this Complaint and alleges as follows:

1. Howell Chevrolet Company, a corporation organized and existing by virtue of the laws of the State of California, herein called Respondent Howell, is engaged in, and at all times material herein, has been engaged in the operation of an automobile agency dealership and repair shop in

Glendale, California, for the sale and distribution of new Chevrolet motor cars, trucks and parts under a franchise or dealer's agreement with the Chevrolet Division of General Motors Corporation.

2. Respondent Howell, in the course and conduct of its business, has caused and is causing large amounts of equipment, materials and supplies to be acquired and purchased, transported and delivered in interstate commerce from and through states of the United States other than the State of California to its place of business in Glendale, California.

3. Respondent Howell, in the course and conduct of its business, as specified above, obtains large numbers of new Chevrolet motor cars and trucks from the Chevrolet Division of General Motors Corporation assembly plant in Van Nuys, California, of which more than 50 per cent of the parts, equipment and supplies used in the assembly of such motor cars and trucks was shipped from outside the State of California.

4. International Association of Machinists, District Lodge No. 727, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

5. On January 31, 1950, Lodge 727, pursuant to Section 9 (c) of the Act, duly filed with the Board a Petition for Certification of Representatives in Matter of Howell Chevrolet Co., Case No. 21-RC-1146. Following a hearing, the Board, on May 5,



1950, directed that an election be held among employees of Respondent Howell. On June 1, 1950, pursuant to the direction of the Board, an election was conducted. On June 7, 1950, Lodge 727 filed objections to conduct affecting the results of said election. On August 9, 1950, the Acting Regional Director for the Twenty-First Region of the Board issued his Report on Objections. On August 29, 1950, the Board issued an Order Directing Hearing on Objections.

6. A unit composed of all employees of Respondent Howell at its establishment at Glendale, California, excluding salesmen, office and clerical employees, professional employees, guards and supervisors as defined in the Act, is a unit appropriate for the purposes of collective bargaining as defined in Section 9 of the Act.

7. At all times since on or about January 31, 1950, Lodge 727 has been and now is the duly designated collective bargaining representative of the employees in the unit set forth in paragraph 6 hereof.

8. From on or about January 31, 1950, to the date hereof, Respondent Howell, by its officers, supervisors, agents and representatives, including, but not limited to Frederick A. Potruch, has failed and refused, and does now fail and refuse, to bargain collectively with Lodge 727 with respect to wages, hours and conditions of employment of the employees in the unit set forth in paragraph 6 hereof.

9. Respondent Howell, by its officers, supervisors, agents and representatives, including, but not limited to Frederick A. Potruch, from on or about January 31, 1950, to the date hereof, has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, by various acts and statements including, but not limited to, the following:

(a) Coercing and intimidating employees by threats of reprisal if they should join Lodge 727 and promises of reward if they should refrain from supporting Lodge 727;

(b) Stating to employees that, if Lodge 727 won the election referred to in paragraph 5 hereof, it would not bargain with Lodge 727 or enter into a contractual relationship with it; and

(c) Stating to employees that it would discriminate against employees engaging in strikes or other concerted activities because of respondent's refusal to bargain with Lodge 727.

10. Respondent Howell, by its officers, agents and supervisory employees, did, on or about March 31, 1950, discharge Claude Leonard because of his activities on behalf of and his membership in Lodge 727, and has thereafter refused reemployment to Claude Leonard because of his activities on behalf of and his membership in Lodge 727.

11. Respondent Howell, by its officers, agents and representatives, did, on or about March 31, 1950,

discharge Claude Leonard because he testified as a witness at a formal hearing in National Labor Relations Board case 21-RC-1146, and for the same reason has thereafter refused to reemploy him.

12. By the acts and conduct set forth and described in paragraphs 8 through 11 hereof, Respondent Howell has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and did thereby engage in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

13. By the acts and conduct set forth and described in paragraph 8 hereof, Respondent Howell has refused to bargain collectively with the representatives of its employees and did thereby engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

14. By the acts and conduct set forth and described in paragraph 10 hereof, Respondent Howell did discriminate and is now discriminating in regard to the hire and tenure and conditions of employment of its employees to discourage membership in Lodge 727, and did thereby engage in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

15. By the acts and conduct set forth and described in paragraph 11 hereof, Respondent Howell did thereby engage in, and is now engaging in,



unfair labor practices within the meaning of Section 8 (a) (4) of the Act.

16. The acts and conduct of Respondent Howell, as set forth and described in paragraphs 8 through 11 hereof, occurring in connection with the business of Respondent Howell, as described above, have a close, intimate and substantial relation to commerce, as defined in Section 2 (6) of the Act, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce as defined in Section 2 (7) of the Act.

17. The acts and conduct of Respondent Howell, set forth and described in paragraphs 8 through 11 hereof, occurring in connection with the business of Respondent Howell, as described above, constitute unfair labor practices affecting commerce within the meaning of Sections 8 (a) (1), 8 (a) (3), 8 (a) (4), 8 (a) (5), and Sections 2 (6) and 2 (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region this 15th day of September, 1950, issues this Complaint against Respondent herein.

[N.L.R.B. Seal.]

/s/ HOWARD F. LeBARON,  
Regional Director National Labor Relations Board,  
Twenty-First Region.

[Admitted in evidence October 31, 1950, as General Counsel's Exhibit No. 1-I.]



[Title of Board and Cause.]

## ANSWER

Comes now Howell Chevrolet Company, respondent in the above-entitled matter, and for answer to the complaint filed herein, admits, denies and alleges as follows:

### I.

Respondent denies generally and specifically all allegations contained in paragraphs 2, 4, 7, 8, 9 (a), 9 (b), 9 (c), 10, 11, 12, 13, 14, 15, 16 and 17.

### II.

Respondent is without knowledge sufficient to answer the allegations of paragraph 3 of the complaint herein and basing its answer upon such lack of knowledge, denies generally and specifically all allegations contained in said paragraph and demands strict proof thereof.

### III.

As a statement of fact as required by Section 203.20 of the National Labor Relations Board Rules and Regulations, Series 5, as amended, respondent alleges as follows:

A. That District Lodge No. 727 of the International Association of Machinists never had a majority of respondent's employees in the unit as set forth in paragraph 6 of the complaint herein.

B. That Claude Leonard was not discharged

because of his affiliations with District Lodge 727 of the International Association of Machinists or because he testified as a witness at a formal hearing in National Labor Relations Board Case No. 21-RC-1146. Claude Leonard's discharge was predicated on sound economic reasons and reasons of cause.

Wherefore, respondent prays that the complaint be dismissed and for such other and further relief as the Board deems just and reasonable.

CARTER & POTRUCH,  
By /s/ FREDERICK A. POTRUCH,  
/s/ JAMES M. NICOSON,  
Attorneys for  
Howell Chevrolet Company.

Duly verified.

Affidavit of Service by Mail attached.

[Admitted in evidence October 31, 1950, as General Counsel's Exhibit No. 1-K.]

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[Title of Board and Cause.]

### AMENDMENT TO COMPLAINT

Please Take Notice that the Complaint in the above-entitled matter, issued on September 15, 1950, is hereby amended as follows:

1. Add paragraph 10(a) to Complaint—

“10(a). Respondent Howell, by its officers, agents, and supervisory employees during the

period from February 1, 1950, to March 31, 1950, refused to assign Claude Leonard to his regularly scheduled work because of his activities on behalf of and his membership in Lodge 727."

2. Amend paragraph 14 by adding—

"and paragraph 10(a)" following the words "paragraph 10" in the second line.

Dated at Los Angeles, California, this 16th day of October, 1950.

/s/ HOWARD F. LeBARON,  
Regional Director National Labor Relations Board,  
Twenty-First Region.

[N.L.R.B. Seal.]

[Admitted in evidence October 31, 1950, as General Counsel's Exhibit No. 1-L.]

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[Title of Board and Cause.]

## ANSWER TO AMENDMENT TO COMPLAINT

Comes now the respondent herein, Howell Chevrolet Company, and for answer to the amendment to the Complaint denies generally and specifically all allegations therein contained.

/s/ JAMES M. NICOSON,

Attorney for

Howell Chevrolet Company.

[Admitted in evidence October 31, 1950, as General Counsel's Exhibit No. 1-N.]

[Title of Board and Cause.]

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### Statement of the Case

Upon a petition duly filed on January 31, 1950,<sup>1</sup> by International Association of Machinists, District Lodge No. 727, herein called the Union, the National Labor Relations Board, herein called the Board, held a hearing on March 15, to determine whether the employees of Howell Chevrolet Company, Glendale, California, herein called the Respondent, desired to be represented by the Union for the purposes of collective bargaining. Thereafter and on May 5, the Board issued an order<sup>2</sup> directing that an election be conducted among the Respondent's employees in a certain appropriate unit under the auspices of the Regional Director for the Twenty-First Region (Los Angeles, California).

On June 1, the said election was held and the Union lost the election.<sup>3</sup> The Union, on June 7, filed objections to the conduct of the election, and on August 9, the then Acting Regional Director for the Twenty-First Region issued his report on the objections finding that the aforesaid objections

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<sup>1</sup>Unless otherwise noted all events referred to herein occurred in 1950.

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<sup>2</sup>89 NLRB No. 142.

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<sup>3</sup>Of the 26 valid votes cast, 11 were cast for the Union, 13 against, and 2 were challenged.



raised substantial and material issues and recommended that a hearing be held to resolve said issues. No exceptions were filed by any of the parties to the said Acting Regional Director's recommendations. The Board, by order dated August 29, adopted the aforesaid recommendations and ordered a hearing to be held for the purpose of resolving the issues raised by the Union's objections.

Upon a charge and an amended charge duly filed on June 6 and July 26, respectively, by the Union, the General Counsel of the Board, herein called the General Counsel, issued his complaint on September 15, alleging that the Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1), (3), (4), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint, charge, amended charge, Union's objections to the election, the Acting Regional Director's report with respect thereto, the Board's order directing a hearing on the said objections, together with notice of hearing on the complaint and on the objections, were duly served upon the Respondent and upon the Union.

With respect to the unfair labor practices, the complaint alleged, in substance, that the Respondent (1) discharged Claude Leonard on or about March 31, and thereafter refused to reinstate him because of his membership and activities in behalf

of the Union and because he testified as a witness at a formal hearing in the Matter of Howell Chevrolet Company and International Association of Machinists, District Lodge No. 727<sup>4</sup>; (2) since on or about January 31, refused to bargain collectively with the Union although the Union previously had been designated and selected the collective bargaining representative by the Respondent's employees in a certain appropriate unit as such representative; and (3) engaged in certain stated conduct and made various statements which interfered with, coerced, and restrained its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On September 22, the Respondent duly filed an answer denying the commission of the alleged unfair labor practices. On October 30, the Respondent duly filed an "Answer to the Amendment to Complaint."

Pursuant to notice, a hearing was held from October 31 to November 3, both dates inclusive, at Los Angeles, California, before the undersigned, Howard Myers, the duly designated Trial Examiner. The Respondent and the General Counsel were represented by counsel; the Union by representatives thereof. All parties participated in the hear-

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<sup>4</sup>On October 6, the General Counsel served upon the Union and upon the Respondent "Amendment to Complaint" wherein he alleged that Leonard was discriminatorily refused his regularly scheduled work during February and March, 1950.

ing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues.

At the conclusion of the General Counsel's case-in-chief, the Respondent's motions to dismiss the complaint in its entirety or, in the alternative, to dismiss certain stated portions thereof, were denied. At the conclusion of the taking of the evidence, the General Counsel moved to conform the pleadings to the proof with respect to minor variances, but not to include any new unfair law practices, was granted without objection. Counsel for the Respondent then renewed his motions to dismiss the complaint. Decision thereon was reserved. The motions are hereby denied. The parties were then informed that they might file briefs or proposed findings of fact and conclusions of law, or both, with the undersigned on or before November 18.<sup>5</sup> Briefs have been received from the Respondent and from the General Counsel which have been carefully considered by the undersigned.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

### Findings of Fact

#### 1. The business of the Respondent

Howell Chevrolet Company, a California corporation, is engaged in, and at all times material herein

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<sup>5</sup>Subsequently the time was extended to December 6.



has been engaged in, the operation of an automobile agency dealership and automobile repair and service shop in Glendale, California, for the service, sale, and distribution of new Chevrolet automobiles, trucks, accessories, and parts under an exclusive franchise or dealer's agreement with the Chevrolet Motor Division—General Motors Corporation. The Respondent also operates a used car lot which is located across the street from its main showroom and service station.

During 1949, the Respondent purchased from the Chevrolet Motor Division—General Motors Corporation—new Chevrolet automobiles and trucks valued at \$960,797.97 and parts and accessories valued at \$129,145.01. In addition, during 1949, the Respondent purchased from sources other than Chevrolet Motor Division—General Motors Corporation—parts and accessories valued at \$36,240.35. During the same year, the Respondent's sales of new Chevrolet cars and trucks amounted to \$1,246,812.50 and sold parts and accessories valued at \$256,850.62.

The Chevrolet Division—General Motors Corporation—maintains a new car and truck assembly plant at Van Nuys, California, from which the Respondent obtains its new cars and trucks.

For the fiscal year ending September 30, 1950, motor vehicle production parts, parts and accessories valued in excess of \$5,000,000 were shipped to the said Van Nuys plant, of which amount approximately 43 per cent were shipped from points



located outside the State of California. During the aforesaid fiscal year, the Respondent's purchases from Chevrolet Motor Division—General Motors Corporation—amounted to more than \$1,500,000 but were less than \$2,000,000.

All the Respondent's sales of automobiles, both new and used, parts, and accessories, are made either locally or within the State of California.

Counsel for the Respondent contended at the hearing, and in their brief, that the complaint should be dismissed because, among other reasons, the Respondent is not engaged in commerce within the meaning of the Act, and even if it were so engaged, the Board nonetheless should not assert its jurisdiction because of the local character of the Respondent's business. For the reasons set forth by the Board in the Baxter Bros. case, 91 NLRB No. 233, the undersigned finds the contention to be without merit.<sup>6</sup> Upon the basis of the entire record, the undersigned finds that during all times material herein the Respondent was, and now is, subject to the Board's jurisdiction and that it will effectuate the policies of the Act for the Board to assert its jurisdiction.

## II. The organization involved

International Association of Machinists, District Lodge No. 727 is a labor organization admitting to membership employees of the Respondent.

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<sup>6</sup>See also NLRB v. M. L. Townsend (C.A. 9), 26 LRMM 2561.

## III. The unfair labor practices

A. The refusal to bargain collectively  
with the Union

## 1. The appropriate unit

The complaint alleged, as the Board found in its Decision and Direction of Election, dated May 5, 1950,<sup>7</sup> that all employees of the Respondent at its establishment in Glendale, California, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the Act, constituted a unit appropriate for the purposes of collective bargaining.<sup>8</sup> In its answer the Respondent neither denied nor admitted that such unit was appropriate. Under the circumstances, the undersigned finds that all employees of the Respondent at its establishment in Glendale, California, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the Act, at all times material herein constituted, and now constitute, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and that the said unit insures to the Respondent's em-

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<sup>7</sup>89 NLRB No. 142.

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<sup>8</sup>In the representation case the Board rejected the Respondent's contention that the appropriate unit should consist only of employees who are supervised by its service manager.

ployees the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act.

2. The majority status of the Union  
in the appropriate unit

At the hearing herein, there was introduced in evidence by the General Counsel a list prepared by the Respondent containing the names of all the Respondent's employees in the unit hereinabove found appropriate. The list shows that on February 1,<sup>9</sup> the Respondent had in its employ 28 persons in the said unit.<sup>10</sup> On behalf of the General Counsel there were offered and received in evidence 20 signed cards expressly authorizing the Union to represent the signers for collective bargaining. The genuineness of the signatures on the cards was in some instances proved directly by the testimony of the signers and in some instances by witnesses to the signatures. The authenticity of the signatures appearing on the cards was not challenged.

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<sup>9</sup>It was stipulated by counsel that the persons whose names appeared on this list were also in the Respondent's employ on January 31.

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<sup>10</sup>The list also contains the name of Frank Ogen. This person, the record clearly shows, and the undersigned finds, was, at all times material herein, a supervisor within the meaning of the Act and hence is excluded from the unit. The General Counsel's contention that Fred Bordeau should be excluded from the unit on the sole ground that he is the son of the Respondent's service manager is without merit. The undersigned includes Fred Bordeau in the unit.



The undersigned has compared the names appearing on the aforesaid cards with the list submitted by the Respondent and received in evidence and finds that as of January 31, 1950, 14 employees in the appropriate unit had signed cards designating the Union as their collective bargaining representative.<sup>11</sup> Claude Leonard testified without contradiction that he joined the Union on or about January 23. On January 30, Leonard attended a meeting of the Union and there he was elected senior chairman or shop steward by his co-workers who attended the meeting. The undersigned accordingly finds that on January 31, 1950, and at all times thereafter, the Union was the duly designated collective bargaining representative of the Respondent's employees in the unit found appropriate. Pursuant to Section 9 (a) of the Act, the Union was, therefore, the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

### 3. The refusal to bargain

As found above Claude Leonard joined the Union about January 23. At a meeting held at the Union Hall on the evening of January 30, 6 employees of the Respondent signed cards designating the Union their collective bargaining representative. They also

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<sup>11</sup>One of these 14 employees signed a card on January 28, 6 signed on January 30, and 7 signed on January 31.



selected or elected Leonard senior chairman or shop steward.

The following morning, January 31, the 8 employees who attended the Union meeting appeared at work wearing Union buttons; Leonard's button bore the inscription "Senior Chairman." Prior to the commencement of work that day Leonard secured the signatures of four additional employees to authorization cards. Three other employees signed authorization cards sometime during that day.

Under date of January 31, after 15 of the 28 employees in the appropriate unit had either joined the Union or had designated the Union their collective bargaining representative, the Union wrote the Respondent that it had been designated the collective bargaining representative by a majority of the Respondent's employees and requested recognition. The letter concluded with a request that the Respondent fix a convenient time for a conference to discuss a collective bargaining agreement. The Respondent admittedly received the letter on February 1, and admittedly did not answer it.

On January 31, the Union filed with the Board a representation petition.

The Respondent's immediate reaction to the employees' activities on behalf of the Union was to embark upon a campaign to destroy the Union's majority by demonstrating to its employees the futility of becoming, or remaining, members thereof. Thus, according to the undenied and credible testi-

mony of Leonard he had a conversation with Body-Shop Foreman Frank Ogen sometime about a week or so after January 31, wherein the following ensued:

Well, I was out there in the body shop one day at noon; and he (Ogen) told me to get away from him with that button on. He didn't want to get fired. So I told him there wasn't anybody going to get fired over the buttons. He said that Mr. Howell (Jackson Howell, the Respondent's president) told him he was going to fire anyone that joined the union.<sup>12</sup>

George A. Kirkland, who was formerly employed by the Respondent as a mechanic for approximately 5 years prior to October, 1950, and presently self-employed, testified that sometime during the first week in February, he and Leonard asked Ogen where Ogen "got his information that all the em-

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<sup>12</sup>Ogen did not testify. Howell denied that he made the statement Ogen attributed to him. Howell's denial does not, and can not, negate the violative tenor of Ogen's remarks or their coercive effect. Respondent's counsel contended in their brief, for the first time, that Frank Ogen was not in fact a supervisory employee, and that, consequently, the Respondent could not be held accountable for the latter's conduct and statements. The record fails utterly to support this contention. On the contrary, Howell admitted that Ogen was the body-shop foreman in February and March, 1950. The record, moreover, clearly shows that the employees regarded Ogen as foreman of the body shop and took orders from him. The fact that Bordeau was general service manager during that time did not alter Ogen's status nor his powers.

ployees that joined the union were going to be fired" and that Ogen replied that he had received the information from Howell the previous night.

Former employee George A. Smith testified, and the undersigned finds, that Ogen asked him several times prior to the Board-conducted election of June 1, what he "was going to do about the union" and whether he "was in the Union"; that on one occasion before the said election, Ogen asked him if George Kirkland had induced him to join the Union; and that on another occasion, prior to the election, Ogen told him that "any man that joined the union would be fired," adding, to quote Smith, "He never did work in a union shop; he never would. He wouldn't have any union men working for him."

Paul Arnold, a former employee of the Respondent, testified credibly that a day or two after January 31, he asked

him [Ogen] what he thought about the guys going in [the Union], and he said they had better watch out for their jobs, because Howell said to fire them all that are wearing buttons.

Arnold further testified that a few days after the above related conversation he voluntarily left the Respondent's employ.

In the latter part of March or in the early part of April, all the shop employees were assembled by the Respondent. Howell opened the meeting, introduced Frederick A. Potruch, Esq., as the Respondent's counsel, and then told the assembled em-



ployees that Potruch would outline to them the Respondent's labor relations policies.

Regarding what he told the employees, Potruch testified, in part as follows:

I told them that the Company would test the jurisdiction of the National Labor Relations Board. I told them that it had been done on other occasions; that they were probably aware of that and had been told so by the union.

\* \* \*

\* \* \* that I felt that if there was anything to be done by the company and the union that they were big enough to do it for themselves without having anyone step in and tell them what to do and not what to do as put in the Act, and I have named the Act, the Taft Hartley Act \* \* \*

After I presented that to them I went into the ramifications of how the jurisdiction of the Board could be decided. I told them that this was a representation proceeding, that the union was asking that they represent the men to bargain collectively, and that it was at these proceedings that we would deny the jurisdiction of the Board; that there would be a formal hearing, that we would have to run through the gamut of a formal hearing; and I told them that we would still stick to our guns on the question of jurisdiction at all times, just as we have done in these proceedings. And I told them the only way we could get an adequate test on the question of jurisdiction, if it was



to go that far, would be to go into the Circuit Court of Appeals as had been done in the Townsend case;

\* \* \*

It might even necessitate—that for any company not necessary Howell, to get a case into the United States Circuit Court of Appeals, it might be necessary to do something to be cited for an unfair act under the National Labor Relations Act that someone might have to be discharged, either on a friendly basis or even deliberately and then the charge brought \* \* \*

\* \* \*

And then we would have a hearing on it as we are now having \* \* \*

\* \* \*

I also told them that it was possible for a company \* \* \* that during this period in which there was either a friendly unfair labor charge or an unfair labor act or even a deliberate one \* \* \* that it is possible to have what is known as an unfair labor strike \* \* \*

Potruch also told the assembled employees that he would fight the case to Howell's last dollar.

Kirkland testified that Potruch stated at this meeting that the employees did not need a union inasmuch as it was a small establishment; that the employees would never get a union contract from Howell; that the employees would have to go out on strike to obtain a contract; and that the Respondent would not make any change in wages or other

working conditions unless the Respondent consulted the Union, adding "by God the company wouldn't do that." Other witnesses called by the General Counsel corroborated, in the main, Kirkland's version of what Potruch said at the aforesaid meeting.

Potruch denied making the statements to the effect that the Respondent would not sign an agreement with the Union which statements were attributed to him by Kirkland and others. The undersigned rejects Potruch's denials and finds, on the other hand, that he made the said statements. The entire purport of Potruch's remarks, even on the basis of his version, as reflected by his testimony, was to impress upon the employees that it was futile for them to become, or remain, members of the Union because the Respondent would not bargain with the Union or recognize it as the collective bargaining representative of the employees. The fact that Potruch told the employees that, even if the Union won the election, the Respondent would not bargain with the Union is implicit in the following question propounded under cross-examination, to former employee Lee Fitzhugh by the Respondent's counsel:

Don't you remember him [Potruch] saying that the way that they would get the question to the test of the court would be—and the only way—that the company would have to refuse to bargain? That way they could get themselves before the court for review of the question of jurisdiction?

Fitzhugh replied to the above-quoted question, "I

believe he said something to that effect, sir. "A similar question was propounded by counsel for the Respondent to Kirkland and he answered, "Yes."

Each and every phrase of Potruch's address was designed to impress upon the employees that continued union affiliation was a fruitless gesture and that they could rely upon the Respondent's unilateral generosity to attain their economic ends. This finding is buttressed by Potruch's statement, made during the course of the meeting, "if I was an employee that I would go to the employer, state my problems to him and see what I could work out with him; and if the employer, to quote, was 'a son-of-a-bitch,' and wouldn't do anything for me I would go out and hang him. \* \* \*" This finding is also supported by Potruch's repeated statements that he would fight the matter through all the courts in the land.

The most reprehensible portion of Potruch's remarks was his statement that the Respondent would not hesitate to discharge an employee for union activities in order to bring the matter before the courts.<sup>13</sup>

In a recent case <sup>14</sup>, the Board held that a publicized intention under circumstances similar to those in the instant case, to contest matters through the courts was in itself a proscribed act. In that case the Board said:

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<sup>13</sup>Leonard, as found below, was, in fact, discriminatorily discharged.

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<sup>14</sup>Metropolitan Life Insurance Company, 90 NLRB No. 129.



We agree with the Regional Director's finding that the employer's announcement that it would not bargain with U.O.P.W.A. was reasonably calculated to impress upon the employee the futility of voting for U.O.P.W.A. They were haunted with the prospect, if U.O.P.W.A. were certified, of having no collective bargaining relationship with the employer for several years pending a final judicial determination of U.O.P.W.A. status. In our opinion this prospect tended to defer the agents from exercising a free choice in the selection of a bargaining representative. . . . Accordingly, we shall overrule the exceptions of the employer and shall order all six elections set aside.

About 2 weeks prior to the Board-conducted election, Potruch again visited the plant and held meetings with small groups of employees in Bordeau's private office. There were 5 such meetings. At each of these meetings, Potruch first instructed the employees how to mark **their ballot at the forthcoming** Board election. He then said that he intended to sue the Union for libel and would tie up every Union bank account in the United States. He further stated that the Union had used gangsters with respect to organizing other automobile dealers and that if the Union wanted to play rough he would play rough also.

The Respondent's counsel contended in their brief that Potruch's statements to the employees were protected by Section 8 (c) of the Act. Insofar as presently relevant, that section provides that "The



expressing of any views, arguments, or opinion . . . shall not . . . be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” The legislative history of the Act in silhouette against the contemporary background, clearly indicates that the **objective of Section 8 (c)** was to preclude an inference of unfair conduct from an unconnected statement of attitude alone. It was not designed to preclude, as here, consideration of connected, immediate relevant utterances.

Viewed in this light, Potruch’s remarks at each meeting with the employees were violative of the Act.

Assuming, arguendo, that Potruch’s remarks to the employees did not in themselves contain any such threat of reprisal or force or promise of benefit, that fact, standing alone, would not bring the **remarks within the purview of Section 8 (c)** for, as the legislative history of the Act shows, the Congress did not intend that the threats and promises of benefit which remove expressions of views and opinions from the protection of that section must necessarily appear in the context of such statement. It was not, moreover, the intention of the Congress to preclude a consideration of threats or promises of benefits where, as here, they are implicitly and inextricably a part of the conduct in question.<sup>15</sup>

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<sup>15</sup>See 93 Cong. Rec. 4261, 3950, 6601, 6603, 6604-5, 6673, 7002; Sen. Rep. No. 103, 80th Cong., 1st Sess., p. 23, 45; House Rep. No. 245, 80th Cong., 1st Sess., pp. 43, 45; House Rep. No. 245, 80th Cong., 1st Sess., p. 33.

Former employee Boyce Skelton testified that about 2 weeks before the Board-conducted election, Howell told him, during the course of a conversation he had with Howell, "if the union was defeated, why, everybody would get a raise."

Former employee William F. Hansen testified that a few days prior to the aforesaid election Howell came to the place where he worked and said to him, among other things, to "vote in favor of the plant" at the forthcoming election and that he replied, "I will do my best."

George A. Smith, a former employee, testified that several days before the aforesaid election, Howell came up to where he was working and engaged him in a conversation, during which Howell stated, to quote Smith, "he didn't want the National Labor Board in there to tell him how to run his business." Smith further testified that during the said conversation Howell also said that if the Union was defeated at the election the Respondent would raise the mechanics' commissions from 40 to 50 per cent.

Howell denied making the statements attributed to him by Skelton, Hansen, and Smith. The three last named impressed the undersigned as honest and forthright witnesses. Howell did not so impress the undersigned. It was very evident to the undersigned, from Howell's demeanor on the witness stand, that Howell was withholding the true facts. Under the circumstances, the undersigned finds that Howell made the statements attributed to him by

Skelton, Hansen, and Smith. As a matter of fact, within a few days after the election, Howell announced, at a banquet given the employees by the Respondent, a general wage increase which included a raise in commissions for mechanics to 50 per cent.

Skelton testified credibly and without contradiction that about a week or two before the election, Service Manager Bordeau said to him and a group of about 3 to 5 other employees, during the course of a conversation, "if the union was defeated that everyone would get a raise."

Smith testified that about 2 weeks before the election he heard Bordeau tell Employee Kenneth Herrick, "if the union went in Howell would shut his doors."

With respect to his conversation with Herrick, Bordeau testified that one evening while he was in a bar and grill near the plant, the following ensued:

Well, I was in there first. He [Herrick] came in and sat down beside me, and he said, "Chub, what about this union? What are we going to do about this union deal?" And I said, "Well, Kenny, there is nothing to do about it but use your head. You do whatever you see fit, whatever you think is best for you."

Herrick's testimony on this point, on direct examination by Respondent's counsel, is as follows:

Q. Now, there has been some testimony, Mr. Herrick, about an occasion in a place called the Playhouse Bar and Grill in our fair city of



Glendale, at which time Mr. Bordeau was there, you were there, and a fellow by the name of Mr. George Smith was there.

Do you remember that occasion?

A. Not exactly that one occasion. It might have been a couple of different times.

Q. All right. Do you remember speaking to Mr. Bordeau in a bar about the union?

A. Well, I wouldn't say that we spoke about the union—I mean, it may have been brought up—but not especially.

Q. Do you recall such a conversation?

A. Not exactly, no.

Q. Do you recall ever saying anything to Mr. Bordeau in a bar about a union?

A. No. The only thing, if anything was ever said, was that we would have—we were privileged to vote any way we wanted.

Q. You remember something like that did occur?

A. It could have, yes, sir.

Q. You recall who were present besides you and Mr. Bordeau?

A. I do not; there were sometimes maybe four or five or six or seven of the boys who happened to stop there after work.

Q. What did you say to Mr. Bordeau and what did he say to you?

A. That I do not remember.

Q. You do not recall the substance of any of the conversations on these occasions?

A. Definitely not.



Q. I will ask you for the purpose of refreshing your recollection if you did not ask Mr. Bordeau what to do about the union question—that, or that in substance. Now, just answer that question yes or no.

A. Well now, I do not think I would ask anybody what to do about the union because that is my own privilege.

Q. Mr. George Smith has testified that on occasions in the Playhouse Bar, at which you were present, Mr. Bordeau was present and Mr. Smith was present, that Mr. Bordeau said to you that if the union organized the Howell shop, that Mr. Howell would close it down. Did any such conversation ever take place?

A. I do not believe it did.

Upon the entire record in the case, the undersigned is of the opinion, and finds, that Smith's version of the Bordeau-Herrick conversation to be substantially in accord with the facts.

Potruch testified that sometime between February 8 and 14, at an informal conference held at the Board's Regional offices at which was present, besides himself, one or two Field Examiners of the Board and one or more Union representatives, he stated that he did not believe that the Union represented the majority of the Respondent's employees in the appropriate unit. He also testified that the Union did not then, nor since, show him, the Respondent, or any other representative of the Respondent, any evidence of its majority status.

Regarding this informal meeting, Edward M. Skagen, a Grand Lodge representative of the Union, testified, on direct examination by the General Counsel, as follows:

Q. Mr. Skagen, there has been some testimony here that there was a conference held, an informal conference, held in the National Labor Relations Board's office in the month of February with Mr. Fred Davis, a Board Field Examiner, and Mr. Potruch concerning the Howell Chevrolet case. Did you ever attend such a conference?      A. Yes, I did.

Q. And when was that?

A. As I recall, it was in the month of February and I believe the exact date would be around February the 6th.

Q. Will you tell us who was present there?

A. Well, there were two Field Examiners from the National Labor Relations Board. One was Mr. James Carr and the other one was Mr. Fred Davis and Mr. Frederick A. Potruch, myself and I am not certain but I believe Tiny Gordon and John Foote were present. I am not sure about the latter two, however.

Q. Will you tell us what took place at that conference?

A. Well, there was a mixup that morning. Mr. James Carr had a case called Standard Coil Company of which Frederick A. Potruch was the attorney, and we went down into Mr.

Davis' office because we thought we could consolidate both cases.

Trial Examiner Myers: Who is "we"?

The Witness: The group of us, Frederick A. Potruch, myself, Mr. Carr. We went down there and found Mr. Davis in his office on the sixth floor of the National Labor Relations Board. The reason I remember it so well is because Mr. Potruch was sitting on the edge of the table and he says, "I am going to surprise you. I am going to consent to an election. We admit that we are in commerce," and the commerce factor had been a big factor in these automotive cases at that time.

Then Mr. Potruch throws his hands up and says, "Da-dee-da-dee-da."

All of us were very surprised. I would say that everybody including the Field Examiner was speechless because he had admitted commerce.

Then I says, "Oh, you are going to admit commerce in the Howell Chevrolet?"

Then we were deflated because he was admitting commerce in the Standard Coil case and he wasn't prepared to discuss, as I remember it, the Howell Chevrolet case at all that day and would not admit to commerce.

Q. (By Mr. Nutter): Will you tell us what was said about the Howell case?

A. I says, "Oh, I thought we were talking about the Howell Chevrolet case."



Frederick A. Potruch, attorney, says, "Now, Eddie, you know that I wouldn't admit to commerce in one of these automobile cases. We are going to have to go to a hearing on that. In fact, I didn't even bring a brief case or any papers over on it."

Then we went ahead and discussed the Standard Coil case and as I remember it we did not discuss the Howell Chevrolet case any more that day.

Q. Was there any other discussion of Howell at all?

A. Not that I remember. In fact, I distinctly remember there not being any further discussion on it.

Q. Did Mr. Potruch say there that he didn't think the union had a majority at the Howell Company?

A. No, he did not.

The testimony of Delmar A. Gordon, an organizer for the Union, is in substantial accord with that of Skagen. Gordon also testified that Potruch stated at the above-referred-to meeting that Potruch stated that (1) he had no papers with him at that time regarding the Respondent's matter; (2) he had never met Howell; and he did not "know what kind of business [Howell] is in, whether [Howell] sells new or used cars."

Skagen and Gordon each denied that Potruch made any mention of the Union's majority status or lack of majority status.

The undersigned was favorably impressed by the



sincere and straightforward manner with which both Skagen and Gordon testified. On the other hand, Potruch did not so impress the undersigned. The undersigned is firmly convinced that at no time prior to the election, did the Respondent, Potruch, or any one on behalf of the Respondent, ever entertain a doubt that the Union represented the majority of the Respondent's employees in the appropriate unit. Potruch's testimony that he had stated at the informal conference at the Board's offices that he doubted the Union's majority status is an afterthought and is belied by the credible evidence in the record. Throughout the whole period involved herein, Potruch took the adamant position that the Respondent was not engaged in commerce within the meaning of the Act, and he proceeded to defend his client's position along that line. It is significant to note that Potruch did not testify that he ever demanded, at the informal meeting or at any other time, proof of the Union's majority status.

Under the circumstances, the undersigned finds that Skagen's and Gordon's versions of what transpired at the informal conference at the Board's offices in February to be substantially in accord with the facts.

Upon the basis of the credible evidence in the case, as epitomized above, the undersigned concludes and finds that on and since January 31, 1950, the Respondent has refused to bargain collectively with the Union as the statutory representative of the

Respondent's employees in the unit found appropriate with respect to rates of pay, wages, hours of employment, and other conditions of employment, and by such refusal interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8 (a) (5) and (1) thereof.

The undersigned further finds that the Respondent violated Section 8 (a) (1) by Howell's statements to Skelton, Hansen, and Smith; (2) Bordeaux's statements to Skelton and Herrick; (3) by Potruch's remarks during his two speeches to the employees; and (4) by Ogen's statements to Leonard, Kirkland, Smith and Arnold.

Upon the basis of the above findings, the undersigned concludes and finds, that the Respondent interfered with the conduct of the Board-conducted election of June 1, 1950, thereby depriving the employees of the freedom of choice of representatives contemplated by the Act. Accordingly, the undersigned recommends that the said election be set aside and vacated.

#### B. The discriminatory discharge of Claude Leonard

Leonard has been an experienced all around mechanic for the past 25 years. Most of his time during this period was spent largely in repair and service of Chevrolet automobiles. He is a certified and approved Chevrolet mechanic. For 9 consecutive years he has received the General Motors diploma for having successfully completed courses of

instruction in Chevrolet mechanics and repair.<sup>16</sup>

His experience during the past 25 years included front end work, the overhauling and repair of motors, transmissions, and rear ends, grinding valves, and other types of mechanical work performed in a general garage. For a period of 3 years he operated his own repair shop in St. Louis, Missouri.

Leonard was first employed by the Respondent in 1944, as a line mechanic. His duties as such required him to overhaul motors and transmissions, rear end work, reline and adjust brakes, and to perform front end work. After a little more than a year of service with the Respondent, the latter's then service manager opened his own repair shop and Leonard went to work for him as a general mechanic.

After remaining in the employ of Howell's former service manager for a little over 2 years, Leonard secured employment with another Chevrolet dealer, where he remained for about a year.

Leonard was re-employed by the Respondent in January, 1948, as a brake repair man. His duties as such required him to reline and adjust brakes, overhaul and repair wheel and master cylinders, and make other repairs on the brake system. Occasionally, during a busy period, he was requested and did, other types of mechanical work. For example, when the front end man was on vacation for 2 weeks in August, 1949, Leonard performed front end work in addition to his regular duties. Also when the

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<sup>16</sup>His latest diploma was secured in 1950, while in the Respondent's employ.



front end man was absent during 1949, on account of sickness, Leonard performed his work as well as his own.

As found above, Leonard joined the Union on January 23, was elected or selected by his co-workers senior chairman or shop steward on January 30, and was the leader and spearhead of the Union's organizational drive in the Respondent's establishment. Leonard openly solicited, and obtained many new adherents to the Union from among the Respondent's employees.

On January 31, Leonard wore his senior chairman button to work and admittedly the Respondent's officials saw the button on him that day.

About a week after Leonard commenced wearing his said button in the shop, Ogen warned him, to quote Leonard's testimony "to get away from him with that button on" because "he did not want to get fired" because Howell had said, that Howell "was going to fire anybody that joined the Union."

During the first week in February, Ogen informed Leonard and Kirkland, who also wore a union membership button, that Howell said that he intended to discharge all members of the Union.

Despite these warnings of Ogen's and Bordeaux's admonition in the latter part of February that Leonard should cease campaigning for the Union in the shop or resign his job, Leonard continued his leadership in the Union and continued to wear his button in the shop.

While Leonard was in Respondent's employ mechanics, such as he, received no guaranteed wage.



Their earnings were computed on a straight 40 per cent commission basis<sup>17</sup> for labor performed for each customer. When a mechanic had no work to perform he received no compensation of any sort.

For a month or so prior to January 31<sup>18</sup>, Leonard's semi-weekly net earnings<sup>19</sup> amounted to approximately \$150.

On January 15, Leonard received \$149.96 net for work performed during the two-week period ending that date. On January 31, his net earnings were \$150.88. For the two-week period ending February 15, he received \$98.27 net. For the two-week period ending February 28, he received \$45.52 net. For the two-week period ending March 15, he received \$69.30 net. Leonard's final pay check, which he received on March 31, amounted to \$87.82.

Commencing early in February and continuing until his discharge on March 31, Leonard and two of his co-workers, Kirkland and Fitzhugh, noted that brake adjustment work and the bleeding of the brake system, work which normally in the past had been assigned to Leonard, was being performed, upon instructions of Bordeau, by the men who worked on the lubrication rack, one of whom was Bordeau's son.

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<sup>17</sup>Within a few days after the Board election the commission was raised to 50 per cent.

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<sup>18</sup>The documentary evidence does not disclose any earnings of Leonard prior to January 1, 1950.

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<sup>19</sup>After deductions had been made for withholding tax, social security, and the like.

On March 15, Leonard testified on behalf of the Union at the hearing in the aforementioned representation proceeding.

On March 31, Leonard worked overtime, and as he turned in his work ticket and prepared to leave the shop Bordeau approached and informed him that he was discharged. Upon asking why he was discharged, Bordeau replied that there was not enough work for the brake man and the front end man to each make a living so the Respondent decided to combine the brake and front end jobs and retain in its employ the front end man. When Leonard protested the Respondent's action of retaining Kenneth Herrick, the front end man, instead of him, stating, among other things, that he had more seniority than Herrick and could efficiently perform front end work, Bordeau replied, to quote Leonard, "Well, that is the way it is to be and he could do nothing further about it."

Admittedly, Leonard was not discharged for inefficiency. The Respondent's answer averred that Leonard's "discharge was predicated on sound economic reasons and reasons of cause." Howell and Bordeau each admitted that Leonard was discharged solely for lack of work.

Bordeau also admitted that since Leonard's discharge, Herrick's earnings have nearly doubled. In fact, three or four times, Herrick had to call upon outside help to aid him.

Bordeau testified he did not recall Leonard to help Herrick, instead of allowing Herrick to ob-

tain outside help, because he did not know where to reach Leonard. This reason does not ring true because Leonard visited the Respondent's establishment on several occasions between March 31 and June 1, on which latter date Howell ordered Leonard off the Respondent's premises. Furthermore, Herrick needed, and obtained, outside help prior to June 1.

Bordeau's testimony, moreover, that he considered Leonard's refusal, "sometime in 1949," to do certain front end and alignment work when he requested Leonard to do so, as evidence that Leonard would not be interested in the combined brake and front end job, and hence he did not consider Leonard for the job or did not think him capable of performing the combined job properly, is patently untrue. The record discloses that when Bordeau requested Leonard to do the front end and alignment work, Leonard was actually working on another job and hence was unable to undertake the proffered job.

Upon the entire record in the case, the undersigned concludes and finds that Leonard was discharged on March 31, 1950, in violation of Section 8 (a) (3) and (4) of the Act because of his membership and activities in behalf of the Union and because he gave testimony on March 15, 1950, in a formal hearing before the Board. Viewed against the anti-Union background of the Respondent, as found above, coupled with Potruch's statements that, if necessary, the Respondent would discharge



a Union adherent in order to bring the entire matter before the courts, Leonard's discharge, coming as it did, becomes more than a mere coincidence. Furthermore, it was incumbent upon the Respondent to produce its records, or other reliable evidence, in place and stead of the mere statements of Howell and Bordeau to prove that Leonard's discharge was necessitated by economic reasons. This is especially so since Bordeau admitted that subsequent to Leonard's discharge Herrick's earnings almost doubled, that at times Herrick needed additional help, and that the Respondent was then having "a busy season."

#### IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. The remedy

Having found that Respondent has engaged in unfair labor practices, violating Section 8 (a), (1), (3), (4) and (5) of the Act, it will be recommended



that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has discriminated in regard to the hire and tenure of employment, and the terms and conditions of employment, of Claude Leonard the undersigned will recommend that the Respondent offer to Leonard immediate and full reinstatement to his former or substantially equivalent position<sup>20</sup>, without prejudice to his seniority and other rights and privileges. The undersigned will also recommend that the Respondent make Leonard whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, by payment to him of a sum of money equal to the amount he would have normally earned as wages from March 31, 1950, to the date of the Respondent's offer of reinstatement, less his net earnings during that period.<sup>21</sup> Loss of pay shall be paid in accordance with the formula enunciated by the Board in *F. W. Woolworth*, 90 NLRB No. 41.

Having found that the Respondent has refused to bargain collectively with the Union as the representative of the majority of the employees in an appropriate unit, the undersigned will recommend that the Respondent, upon request, bargain collectively with the Union as the exclusive statutory rep-

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<sup>20</sup>See *The Chase National Bank of the City of New York, etc.*, 65 NLRB 827.

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<sup>21</sup>See *Crossett Lumber Co.*, 8 NLRB 440.

representative of all the employees in the unit herein found appropriate.

The scope of the Respondent's illegal conduct discloses a purpose to defeat self-organization among its employees. It sought to coerce them in the exercise of the rights guaranteed them by the Act by, among other things, refusing to bargain collectively with the statutory representative of its employees and by discriminatorily discharging Claude Leonard because of his Union affiliations and because he gave testimony in a formal hearing before the Board. Such conduct which is specifically violative of Section 8 (a) (1), (4), and (5) of the Act, reflects a determination generally to interfere with, coerce, and restrain its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and presents a ready and effective means of destroying self-organization among its employees. Because of the Respondent's unlawful conduct and since there appears to be an underlying attitude of opposition on the part of the Respondent to the purposes of the Act to protect the rights of employees generally,<sup>22</sup> the undersigned is convinced that if the Respondent is not restrained from committing such conduct, the danger of their commission in the fu-

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<sup>22</sup>See *May Department Stores Company, etc.*, NLRB, 326 U. S. 376.

ture is to be anticipated from the Respondent's past conduct, and the policies of the Act will be defeated. In order, therefore, to make effective the interdependent guarantees of Section 7 of the Act, to prevent a recurrence of unfair labor practices, and thereby minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies, the undersigned will recommend that the Respondent cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

The undersigned further recommends that the June 1, 1950, election among the Respondent's employees be set aside and vacated.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

### Conclusions of Law

1. International Association of Machinists, District Lodge No. 727, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All the Respondent's employees, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the Act, constitute, and during all times material herein constituted, a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. International Association of Machinists, District Lodge No. 727, was on January 31, 1950, and at



all times relevant thereafter has been, the exclusive representative of all the employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on January 31, 1950, and thereafter, to bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all the employees in the appropriate unit the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (5) of the Act.

5. By the said refusal the Respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8(a) (1) of the Act.

6. By discriminating in regard to the hire and tenure of employment of Claude Leonard, thereby discouraging membership in a labor organization, the Respondent has engaged in, and is engaging in unfair labor practices, within the meaning of Section 8 (a) (3) of the Act.

7. By discharging and otherwise discriminating against Claude Leonard, because he had given testimony under the Act the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (4) of the Act.

8. By interfering with, restraining, and coercing its employees in the exercise of the rights guaran-

teed in Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8 (a) (1) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

### Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that Howell Chevrolet Company, Glendale, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, District Lodge No. 727, or in any other labor organization of its employees by discriminating in regard to their hire or tenure of employment, or any term or condition of employment, because of their membership in, or activity on behalf of, any such labor organization.

(b) Discharging or otherwise discriminating against any employee because he had given testimony under the Act.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist the International Association of Machinists, District Lodge No. 727, or any other labor organization, to bargain collectively

through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from the exercise of such rights.

(d) Refusing, upon request, to bargain collectively with International Association of Machinists District Lodge No. 727, as the exclusive representative of its employees in the above-described appropriate unit.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act.

(a) Upon request, bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all the employees in the above-described appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to Claude Leonard immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights or privileges.

(c) Make whole Claude Leonard for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages from March 31, 1950, to the date of the Respondent's offer of reinstatement, less his net earnings during that period.



(d) Post in its plant at Glendale, California, copies of the notice attached hereto and marked Appendix A. Copies of said notice to be furnished by the Regional Director for its Twenty-first Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-first Region, Los Angeles, California, in writing within twenty (20) days from the receipt of this Intermediate Report what steps the Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report, the Respondent notifies the said Regional Director in writing that he will comply with the foregoing recommendations, the Board issue an order requiring the Respondent to take the aforesaid action.

Dated this 19th day of December, 1950.

/s/ HOWARD MYERS,  
Trial Examiner.

## Appendix A

## Notice to All Employees

## Pursuant to

## The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, District Lodge No. 727, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will Offer to Claude Leonard, immediate reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges previously enjoyed, and will make him whole for any loss of pay suffered as a result of the discrimination.

We Will Not discriminate against or dis-

charge any employees for giving testimony under the Act.

We Will Bargain collectively upon request with the above-named Union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All our employess, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the National Labor Relations Act.

All our employees are free to become or remain members of the above-named Union or any other labor organizations. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any labor organization.

HOWELL CHEVROLET  
COMPANY,  
(Employer)

Dated .....

By .....

(Representative.)      (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.



United States of America  
Before the National Labor Relations Board

Case No. 21-CA-794

In the Matter of:

HOWELL CHEVROLET COMPANY,

and

INTERNATIONAL ASSOCIATION OF MA-  
CHINISTS, DISTRICT LODGE No. 727.

Case No. 21-RC-1146

In the Matter of:

HOWELL CHEVROLET COMPANY,

Employer,

and

INTERNATIONAL ASSOCIATION OF MA-  
CHINISTS, DISTRICT LODGE No. 727,  
Petitioner.

### DECISION AND ORDER

On December 19, 1950, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto; and finding further that

the Respondent had interfered with an election conducted by the Board among the Respondent's employees and recommending that the election be set aside. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief, and the General Counsel filed a brief in support of the Intermediate Report.

The Board<sup>1</sup> has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the exceptions, modifications, and additions set forth below:<sup>2</sup>

The Respondent is engaged in the sale and distribution, at Glendale, California, of new Chevrolet motor vehicles, parts, and accessories, under a

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<sup>1</sup>Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with these cases to a three-member panel.

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<sup>2</sup>The Respondent's request for oral argument is hereby denied as the record, the exceptions and the briefs, in our opinion, adequately present the issues and the positions of the parties.

The Respondent, in its exceptions and brief, alleges that the Trial Examiner was biased and prejudiced against it. We have carefully considered the entire record herein, and although, as noted hereinafter, we do not agree with all the Trial Examiner's conclusions, we find that the allegations of bias and prejudice are without merit.

dealer's agreement with Chevrolet Motor Division-General Motors Corporation. The agreement provides for certain controls as to the Respondent's capital requirements, place of business, hours, servicing facilities, personnel, signs, and local area advertising. The Respondent is one of a limited number of dealers selling Chevrolet products, and, by virtue of its contractual relationship with Chevrolet Motor Division-General Motors Corporation, is an integral part of that corporation's national system of distribution.<sup>3</sup> Under the foregoing circumstances, and on the basis of the entire record, we find, as did the Trial Examiner, that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction over the Respondent.<sup>4</sup>

2. The Trial Examiner found, and we agree, that the Respondent violated Section 8 (a) (1) of the Act by the following conduct which occurred after the Union had requested recognition and before the election was held: (1) Body-Shop Foreman

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<sup>3</sup>The Respondent does not, however, as found by the Trial Examiner, have an "exclusive" franchise.

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<sup>4</sup>Harbor Chevrolet Company, 93 NLRB No. 231; University Motors, 89 NLRB 1224; Public Motors Co., 90 NLRB No. 273; Avedis Baxter and Ben Baxter, d/b/a Baxter Bros., 91 NLRB No. 233; N.L.R.B. v. Townsend, 185 F. 2d 378, cert. den., 341 U. S. 909.



Ogen's<sup>5</sup> coercive anti-union statements to employees Leonard, Kirkland, Smith, and Arnold, to the effect that employees who joined the Union would be discharged, and his interrogation of employee Smith about the latter's union membership and activity; (2) President Howell's coercive antiunion statement to employee Hansen<sup>6</sup> to "vote in favor of the plant," and his promises of benefit to employees

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<sup>5</sup>The Respondent alleges, in its brief, that Ogen was not a supervisor within the meaning of the Act. However, at the hearing, President Howell referred to Ogen as the body shop foreman. Furthermore, employee Smith, who did body and fender work, testified that Ogen was his foreman and that Ogen had told him, "He wouldn't have any union man working under him." Employee Arnold also testified that Ogen was his foreman. It is thus clear that Ogen was regarded by both the Respondent and the employees as a supervisor. Moreover, it was clear at the hearing that the General Counsel was seeking to attribute to the Respondent various acts of interference, which we have found violative of Section 8 (a) (1) of the Act, by virtue of Ogen's supervisory status. Yet the Respondent did not contend that Ogen was not a supervisor or come forward with evidence to rebut the testimony indicating that Ogen was a supervisor. In the light of the entire record, we find that Ogen was a supervisor within the meaning of the Act and that his conduct was attributable to the Respondent.

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<sup>6</sup>The record shows that among the "other things" referred to by the Trial Examiner which Howell told Hansen before the election was a statement that if Hansen would vote in favor of the Respondent "he [Howell] would see that we got a raise in time." We find this statement also violative of Section 8 (a) (1).

Smith and Skelton to the effect that if the Union were defeated the employees would receive a raise; (3) Service Manager Bordeau's promise to employee Skelton that if the Union were defeated, the employees would receive a raise; and his statement to employee Herrick, also heard by employee Smith, to the effect that if the Union were victorious the Respondent would shut down its operations; (4) Attorney Potruch's address to the Respondent's employees in March or April 1950.<sup>7</sup> In finding that this speech violated Section 8 (a) (1), we do not rely on Potruch's declarations that the Respondent would contest the jurisdiction of the Board.<sup>8</sup> Nor do we accept the Trial Examiner's finding that Potruch's remarks to groups of employees about 2 weeks before the election violated Section 8 (a)

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<sup>7</sup>In its exceptions and brief, the Respondent alleges that Potruch's statement that "someone might have to be discharged either on a friendly basis or even deliberately" merely referred to one of the means whereby an employer may test the jurisdiction of the Board. However, this did not preclude the clear implication that Howell might resort to the discharge of its employees for this purpose. Moreover, the coercive effect of this statement was not dissipated by Potruch's declaration that employees could not be legally discharged except for economic reasons or for cause.

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<sup>8</sup>The effect of this statement on the election and its weight as a defense to a refusal to bargain are discussed separately hereinafter.

(1).<sup>9</sup> These talks were primarily concerned with explaining the mechanics of marking the ballots in the forthcoming election. Potruch's comments regarding the Union's alleged rough tactics with regard to another employer, and his threats to repay the Union in kind, concerned Potruch's personal retaliation for such tactics and for alleged derogatory remarks about him in a union pamphlet, and did not imply any retaliation directed against the Respondent's employees. Nor do we adopt the Trial Examiner's observations regarding the legislative history and purpose of Section 8 (c) of the Act. We do find, however, that Potruch's statement at one of these group meetings, as testified to by employee Smith, who was generally credited by the Trial Examiner, that "there would be a new deal after the first of the month,"<sup>10</sup> was a promise of benefit violative of Section 8 (a) (1) of the Act.

3. The Trial Examiner found that employee Leonard was discharged on March 31, 1950, because of his membership in and activities on behalf of the Union, and because he gave testimony in the representation proceedings herein, and that the Respondent thereby violated Section 8 (a) (3) and (4) of the Act. Upon an examination of the entire

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<sup>9</sup>In finding that Potruch's "two speeches" violated Section 8 (a) (1), the Trial Examiner apparently had reference to the talk repeated to several groups of employees about 2 weeks before the election as the second speech.

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<sup>10</sup>The election was held on June 1, 1950.



record herein, including the testimony of the witnesses at the representation hearing, we are of the opinion, however, that the record does not establish that Leonard's testimony, as distinguished from his union membership and activity, was a motivating factor in his discharge. Accordingly, we shall dismiss the complaint insofar as it alleges that Leonard's discharge violated Section 8 (a) (4) of the Act. We are convinced, however, that Leonard was discharged because of his leadership in union activities among the Respondent's employees, as set forth in the Intermediate Report, and we therefore find, as did the Trial Examiner, that the Respondent by discharging him violated Section 8 (a) (3) of the Act.<sup>11</sup>

4. The Trial Examiner found, and we agree, that the Respondent refused to bargain with the Union in violation of Section 8 (a) (5) of the Act;<sup>12</sup> and also, that the election of June 1, 1950, did not represent the free and uncoerced choice of

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<sup>11</sup>In arriving at this conclusion, we do not, however, adopt the Trial Examiner's remarks that under the circumstances, "it was incumbent upon the Respondent to produce its records or other reliable evidence, in place and stead of the mere statements of Howell and Bordeau, to prove that Leonard's discharge was necessitated by economic reasons."

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<sup>12</sup>Although Member Murdock would dissent from this finding for the reasons stated in his dissenting opinion in the M. H. Davidson Company case, 94 NLRB No. 34, he considers himself bound by the majority's decision in that case.

the Respondent's employees and should be set aside. We date the Respondent's refusal to bargain, however, from February 1, 1950, when the Respondent received the Union's request for recognition, and not, as did the Trial Examiner, from January 31, 1950, when the Union achieved a majority and mailed its recognition request to the Respondent.

Upon receipt of the Union's request for recognition, which the Respondent ignored, it promptly embarked on a campaign of unfair labor practices, which included interrogation of its employees concerning their union membership and activity, threats of reprisal against them if they joined the Union or selected it as their bargaining representative, promises of benefit if they rejected the Union, and the discharge of employee Leonard because, as we have found, of his union membership and activity. Nor did the Respondent fail to respond to the Union's request for recognition because it was awaiting the outcome before the Board of the representation proceeding. On the contrary, the Respondent told its employees that the Board did not have jurisdiction over its operations, and that it would not abide by the Board's determination in that proceeding if the Board resolved the jurisdictional issue against the Respondent, but would litigate that issue to the Respondent's "last dollar" through the Supreme Court, if necessary.

Under the foregoing circumstances, and on the basis of the entire record, we are convinced that

the Respondent did not withhold recognition of the Union because of a good faith doubt of the Union's majority in an appropriate unit.<sup>13</sup> We find, on the contrary, that the Respondent's refusal to recognize the Union on February 1, 1950, and thereafter, was motivated by a desire to gain time in which to destroy the Union's majority, and by a rejection of the collective bargaining principle.<sup>14</sup> Furthermore, we do not regard the Respondent's asserted desire to contest the Board's jurisdiction as a defense to its refusal to bargain with the majority representative of its employees.<sup>15</sup>

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<sup>13</sup>We also note in this connection Potruch's testimony that in the course of his address to the employees in March or April, 1950, he told them "that I would not have gone out and paid anybody to go in and represent me until I first had the opportunity to do my own talking," and "that it had gone too far for any of the men to do that; that they had selected voluntarily somebody to represent them and that person would do all their talking for them at any time they wanted to."

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<sup>14</sup>*Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732 (C. A., D. C.); *N.L.R.B. v. Everett Van Kleeck & Company, Inc.*, No. 202, May 31, 1951; C. A. 2.

Indicative of the Respondent's attitude toward collective bargaining are Potruch's statements to the employees in the latter part of April, 1950, that if they had any problems they could take them to Howell, who would straighten them out, that if he did not they should take a rope and hang him, and that the Respondent didn't like a group of men in Washington telling it how to run its business.

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<sup>15</sup>*The Strang Garage Company*, 93 NLRB No. 158.



5. We have found that attorney Potruch's statements to the Respondent's employees that the Respondent would contest the jurisdiction of the Board did not violate Section 8 (a) (1) of the Act. However, we find that these statements were calculated to impress upon the Respondent's employees the futility of voting for the Union and that the Respondent thereby, as well as by the conduct which we have found violated Section 8 (a) (1) and (3), created an atmosphere incompatible with the freedom of choice of its employees in their selection of a bargaining representative, thus interfering with the election.<sup>16</sup> The Respondent urges, however, that by proceeding with the election herein with knowledge of the Respondent's interference with the election, the Union waived its right to have the election set aside. We find this contention to be without merit. As no genuine question concerning representation existed at any time by reason of the Respondent's bad faith in refusing to recognize the Union, we regard the election as a nullity and shall set it aside.<sup>17</sup>

### The Remedy

As recommended by the Trial Examiner, we shall order the Respondent to offer to the discharged employee listed in our Order reinstatement with

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<sup>16</sup>Metropolitan Life Insurance Company, 90 NLRB No. 129.

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<sup>17</sup>The M. H. Davidson Company, *supra*.

back pay from the date of the discrimination against him. However, the Board has recently adopted a method of computing back pay different from that prescribed by the Trial Examiner.<sup>18</sup> Consistent with that policy, we shall order that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date of reinstatement, or a proper offer of reinstatement. The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting, from a sum equal to that which this employee would normally have earned for each quarter or portion thereof, his net earnings,<sup>19</sup> if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

We shall also order, in accordance with the Woolworth decision, *supra*, that the Respondent, upon request, make available to the Board and its agents all records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of our Order.

### Order

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board

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<sup>18</sup>F. W. Woolworth Company, 90 NLRB No. 41.

<sup>19</sup>Crossett Lumber Company, 8 NLRB 440, 497-8.

hereby orders that the Respondent, Howell Chevrolet Company, Glendale, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, District Lodge No. 727, or any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment, because of their membership in, or activity on behalf of, any such labor organization.

(b) By means of interrogation, threats of reprisal, promises of benefit, or in any other manner, interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, District Lodge No. 727, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from the exercise of such rights.

(c) Refusing, upon request, to bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all its employees at its Glendale, California, plant, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the National Labor Relations Act.



2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all the employees in the above-described appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to Claude Leonard immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights or privileges.

(c) Make whole Claude Leonard, in the manner set forth in the section entitled "The Remedy," for any loss of pay which he may have suffered by reason of the Respondent's discrimination against him.

(d) Upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Order.

(e) Post in its plant at Glendale, California, copies of the notice attached hereto and marked "Appendix A."<sup>20</sup> Copies of said notice to be fur-

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<sup>20</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the notice, before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

nished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

And It Is Further Ordered that the election in Case No. 21-RC-1146 be set aside, and that the petition therein be, and it hereby is, dismissed.

And It Is Further Ordered that the complaint, insofar as it alleges that the Respondent violated Section 8 (a) (4) of the Act be, and it hereby is, dismissed.

Signed at Washington, D. C., July 23, 1951.

JOHN M. HOUSTON,  
Member;

ABE MURDOCK,  
Member;

PAUL L. STYLES,  
Member,

[Seal]

NATIONAL LABOR  
RELATIONS BOARD.

## Appendix A

## Notice to All Employees

Pursuant to  
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Association of Machinists, District Lodge No. 727, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment, because of their membership in, or activity on behalf of, any such labor organization.

We Will Not by means of interrogation, threats of reprisal, promises of benefit, or in any manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, District Lodge No. 727, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requir-



ing membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will offer to Claude Leonard immediate reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges previously enjoyed, and will make him whole for any loss of pay he may have suffered as a result of the discrimination against him.

We Will bargain collectively, upon request, with the above-named union as the exclusive representative of all our employees in the bargaining unit described herein, with respect to rates of pay, wages, hours of work, or other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The Bargaining Unit is:

All our employees, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the National Labor Relations Act.

All our employees are free to become, or refrain from becoming members of the above-named union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of

employment against any employees because of membership in or activity on behalf of any labor organization.

Dated .....

HOWELL CHEVROLET  
COMPANY,  
(Employer.)

By .....,  
(Representative.) (Title.)

This notice must remain posted for 60 days from date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board  
Twenty-First Region

Case Nos. 21-CA-794 and 21-RC-1146

In the Matter of:

HOWELL CHEVROLET COMPANY,  
Employer,  
and

INTERNATIONAL ASSOCIATION OF MA-  
CHINISTS, District Lodge No. 727.

Tuesday, October 31, 1950

Pursuant to notice, the above-entitled matter came  
on for hearing at 10:00 a.m.

Before: Howard Myers, Trial Examiner.

Appearances:

RALPH H. NUTTER,  
Appearing on Behalf of General Counsel.

EDWARD M. SKAGEN, and  
DELMAR GORDON,

Appearing on Behalf of International As-  
sociation of Machinists, District Lodge  
No. 727, also on Behalf of Research De-  
partment, Machinists Building, Wash-  
ington, D. C.

CARTER & POTRUCH, by  
FREDERICK A. POTRUCH, and  
JAMES M. NICOSON,

Appearing on Behalf of Howell Chevrolet  
Company. [2\*]



## PROCEEDINGS

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-N, inclusive, for identification, were received in [11] evidence.)

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 2, for identification, was received in evidence.)

## GENERAL COUNSEL'S EXHIBIT No. 2

Howell Chevrolet Co. 1000 So. Brand Blvd. Glendale 4, Calif.			
	Parts	Accessories	New Cars & Trucks
1949 Purchases from Chevrolet Division, Van Nuys .....	65,377.18	63,767.83	960,797.97
1949 Purchases from Others in State of California .....	22,865.18	14,375.17	
	88,242.36	78,143.00	
No Out of State purchases.			
1949 Sales—New Chevrolet Passenger Cars.....			1,103,075.00
1949 Sales—New Chevrolet Commercial Cars.....			143,737.85
			1,246,812.85
All in the State of California.			
1949 Sales—Parts .....			136,029.85
Sales—Accessories .....			120,820.77
All in the State of California.			

Admitted October 31, 1950.

(The document heretofore marked General Counsel's Exhibit No. 3, for identification, was received in evidence.) [13]

\* \* \*

Howell Chevrolet Co.  
1000 So. Brand Blvd.  
Glendale 4, Calif.

Suppliers of over \$500.00—1949

Name	Address	Amount	Type
A. B. C. Wiping Materials.....	1348 W. Slauson, L. A.	837.20	Rags, Clothes, etc.
Bradbury-Robb .....	615 W. Pico, L. A.	576.21	Stationery Supplies
California Motors .....	819 So. Brand, Glendale	594.80	Auto Parts
Chevrolet Motors .....	Van Nuys, Calif.	132,574.83	Parts & Accessories
Coast Bearing & Specialty.....	1144 So. Grand, L. A.	547.98	Parts & Accessories
Crum & Lynn .....	520 So. Brand, Glendale	1016.73	Auto Paint
Fey & Krause .....	1635 So. Figueroa St., L. A.	513.43	Auto Accessories
Garner Supply Co. ....	1725 W. Silver Lake Dr., L. A.	841.07	Paint Supply, etc.
Glendale Body Works .....	541 W. Garfield, Glendale	2698.75	Truck Bodies
Glendale Royal Tire .....	Brand & Chevy Chase, Glendale	1893.28	Tires & Tubes
Hugh Gracie .....	470 W. Colorado, Glendale	864.17	Radiator Repair
Allen Gwynn .....	3717 So. San Fernando, Glendale	887.15	Parts & Accessories
Jewel City Glass .....	500 W. Colorado, Glendale	701.90	Glass
Knox Seeman .....	5218 Avalon Blvd., L. A.	1000.21	Parts
Al Monroe Service .....	1600 E. Olympic, L. A.	1362.41	Tires & Tubes
Motor Parts Depot .....	200 So. Robertson, L. A.	1415.72	Parts
H. M. Parker & Sons .....	230 So. Central, Glendale	1295.92	Tools, Equipment
Pennzoil Co. ....	942 So. Hope, L. A.	3773.87	Oil, Grease

Name	Address	Amount	Type
Psenner-Pauff Inc. ....	620 So. Brand, Glendale	2412.40	Parts, Access., Repair
Reynolds & Reynolds .....	400 W. Pico, L. A.	784.94	Stationery
Schultz & Co. ....	2801 So. Hill, L. A.	2130.67	Accessories
Seaside Oil Co. ....	714 W. Olympic, L. A.	2982.79	Gasoline
Standard Oil Co. ....	805 W. Olympic, L. A.	819.39	Oil, etc.
Sturtevant's Auto Parts .....	1119 So. Brand, Glendale	1050.36	Parts & Access.
Auto Electric Co. ....	5951 Pacific Blvd., Huntington Park	728.21	Electrical Parts
Ace Tire Co. ....	1100 So. Central, Glendale	573.01	Tires & Tubes
K & K Body Works .....	815 W. Temple, L. A.	1750.53	Truck Bodies
Fruehauf Trailer Co. ....	5137 So. Boyle Ave., L. A.	839.39	Truck Bodies
General Truck Equipment .....	746 So. Central, L. A.	813.75	Truck Bodies
Jumbo Equipment Co. ....	1012 So. Los Angeles St., L. A.	500.63	Parts
Lederman Bros. ....	1325 So. Los Angeles St., L. A.	586.66	Upholster Materials
Modern Motors .....	1225 So. Brand, Glendale	633.36	Parts
Martins .....	1243 Alvarado St., L. A.	527.50	Seat Covers
Marvs Ring & Rebore .....	341 W. Colorado, Glendale	563.99	Parts
Ross Top Shop .....	209 W. Colorado, Glendale	508.00	Tops, Seat Covers
U. S. Service & Supply .....	2222 So. Figueroa St., L. A.	509.39	Carburetor Supply
<hr/>			
Passenger Used Cars .....	No. 368	Cost 301,859.01	Reconditioning 17,983.70
Used Cars Commercial .....	No. 17	Cost 11,246.78	Reconditioning 96.32
			Sales 365,985.91
			13,812.00



Mr. Nutter: I have in my possession a photostatic copy which I have had marked for identification as General Counsel's Exhibit No. 5. This photostatic copy was made from an original supplied by the Respondent's counsel, Mr. Potruch. This is a "Direct Dealer Selling Agreement" between the Howell Chevrolet Company and the Chevrolet Motor Division-General Motors Corporation.

I believe, Mr. Potruch, that this agreement is now in effect? Is that correct?

Mr. Potruch: Yes, sir.

Mr. Nutter: And either this agreement or one similar to [14] it will be in effect for the year 1950? Is that right?

Mr. Potruch: We do not know how long. I mean there is an agreement in effect which is similar to it or this one; and until it is revoked, it is good.

\* \* \*

(The Document heretofore marked General Counsels Exhibit No. 5, for identification, was received in evidence.)

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## GENERAL COUNSEL'S EXHIBIT No. 5

Form No. GSD-201-Chevrolet-49

Chevrolet Motor Division  
General Motors Corporation

Direct Dealer  
Selling Agreement

This Agreement, made this 1st day of Nov., A.D.

1949, by and between Chevrolet Motor Division—General Motors Corporation, hereinafter called Seller, and Howell Chevrolet Company of Glendale, Los Angeles County, California, a corporation, hereinafter called Dealer.

Witnesseth:

In Consideration of the promises hereinafter made by the parties to each other, it is agreed as follows:

First: Seller will sell and Dealer will buy Chevrolet motor vehicles and chassis, subject to the terms and conditions hereof, and Dealer shall properly develop the sale of Chevrolet motor vehicles and chassis in the following territory:

\* \* \*

Fourth: This Agreement shall continue in force and govern all relations and transactions between the parties hereto for a term expiring October 31, 1950. At the end of such term, this Agreement shall automatically terminate without notice or action on the part of either party unless sooner terminated as hereinafter provided.

Admitted October 31, 1950.

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(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5-A for identification.) [15]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 5-A, for identification, was received in evidence.)

## GENERAL COUNSEL'S EXHIBIT No. 5-A

Date November 1, 1949

Zone Los Angeles, California.

Los Angeles, California

The area within the corporate limits of Los Angeles including the area lying within the following boundaries; bounded on the South by the center line of Imperial Highway East from Redondo Boulevard to the Los Angeles River, North along the West Bank of the Los Angeles River to Atlantic Boulevard, North on Atlantic Boulevard and Goodrich Boulevard to Olympic Boulevard, East on Olympic Boulevard to Simmons Avenue, North on Simmons Avenue to the Junction of Beverly Boulevard and the Western corporate limits of Montebello, North along the Western corporate limits of Montebello and Monterey Park to Coyote Pass Road, Southwest on Coyote Road to Floral Drive, West on Floral Drive to Eastern Avenue, North on Eastern Avenue to Valley Boulevard, Northeast on Valley Boulevard to the Western Corporate limits of Alhambra, South Pasadena, Pasadena, and then West and North along the Glendale corporate limits to crest of the San Rafael Hills, West along the San Rafael Hills to the Junction of Verdugo Road and La Canada Boulevard, North on La Canada Boulevard to Colina Drive, West on Colina Drive to the Glendale corporate limits, then



follow the Glendale corporate limits West and South to the Los Angeles River, West along the Los Angeles River to the corporate limits of Universal City around the South corporate limits of Universal City to the Junction of Cahuenga and Lankershim Boulevards, South on Lankershim Boulevard and its extended line to Mulholland Highway, West on Mulholland Highway to Sullivan Canyon, South on Sullivan Canyon to the intersection of Sunset Boulevard and Rockingham Avenue, continuing South on Rockingham Avenue to the East corporate limits of Santa Monica, Southeast along the East corporate limits of Santa Monica to Montana Avenue, East on Montana to Centinela Avenue, South on Centinela to Pico Boulevard, East on Pico Boulevard to Sepulveda Boulevard, Southeast on Sepulveda Boulevard to Centinela Boulevard, East on Centinela Boulevard to Redondo Boulevard and South on Redondo Boulevard to Imperial Highway. The above area includes all of the following cities: Bell, Beverly Hills, Eagle Rock, Hollywood, Huntington Park, Inglewood, Maywood, Palms, Vernon, Westwood; and those parts of the following cities included within the above boundary descriptions; Culver City, Glendale, Los Angeles, Lynwood, South Gate, W. Los Angeles, Lennox and Belevedere Gardens.

Admitted October 31, 1950.

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(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5-1 for identification.)

(The document heretofore marked General Counsel's Exhibit No. 5-B, for identification, was received in evidence.) [16]

GENERAL COUNSEL'S EXHIBIT No. 5-B

Chevrolet Motor Division  
General Motors Corporation  
Metropolitan Area Addendum

To Dealer Selling Agreement

The following is expressly declared to be a modification of your Selling Agreement and is hereby approved as such by the General Sales Manager of Chevrolet Motor Division, General Motors Corporation, hereinafter called "Seller":

"Seller has made a survey or an analysis of territories, hereinafter called Metropolitan Areas, which include cities having a population of 50,000 or more or in which two or more Chevrolet dealers have common sales responsibility, and has determined thereupon the maximum number of dealers to be located in each Metropolitan Area and the approximate geographical locations of such dealers. In any Metropolitan Area, however, where Seller shall not have made such a survey or analysis, the maximum number of Chevrolet dealers and their approximate geographical locations and, in addition, the number of established open points shall be the same as those appearing on Seller's records as of November 1, 1949.

“Seller has informed the dealers located within each Metropolitan Area as to the maximum number of dealers to be located therein and their approximate geographical locations, and no changes in respect thereto will be made unless and until a survey, analysis or review of such Metropolitan Area has been made and at least sixty (60) days notice of such proposed change shall have been given to each Chevrolet dealer located therein so that such dealer may, if he so desires, discuss same with Seller prior to the effective date of such change; provided, however, that such notice may be waived by mutual consent of Seller and all dealers located in such Metropolitan Area; and provided further, that if the Selling Agreement of a Chevrolet dealer located in a Metropolitan Area has been terminated or a dealer has knowledge that termination by either party will take place, or that termination by expiration without the grant of a further Agreement by Seller will become effective, and at that time such dealer is handling or undertakes to handle another line of motor vehicles, Seller may appoint, or cause to be appointed, a Chevrolet dealer to be located in such Metropolitan Area one month thereafter, even though the appointment of such dealer may raise temporarily the number of Chevrolet dealers in such Metropolitan Area above the said maximum.



“The word ‘dealers’ herein shall be construed to include both dealers and associate dealers.”

CHEVROLET MOTOR DIVISION, GENERAL  
MOTORS CORPORATION.

/s/ W. E. FISH,  
General Sales Manager.

Per /s/ J. W. STEELE,  
Zone Manager.

(Dealer should file this Addendum with his  
current Selling Agreement.)

Admitted October 31, 1950.

---

\* \* \*

(The document heretofore marked General  
Counsel's Exhibit 5-C, for identification, was  
received in evidence.) [17]

## GENERAL COUNSEL'S EXHIBIT No. 5-C

Direct Dealer  
Selling  
AgreementChevrolet Motor Division  
General Motors Corporation

Form No. GSD-202-Chevrolet

Identification No. 49—1466

Chevrolet Motor Division  
General Motors Corporation

## Terms and Conditions

## Direct Dealer

The following Terms and Conditions have by reference been incorporated in and made a part of the Selling Agreement which shall apply to and govern all transactions, dealings and relations between the parties:

## Selling Rights, Terms and Conditions of Sale

## 1. Dealer's Selling Privilege

While this Agreement shall be and remain in effect, Dealer shall have the non-exclusive privilege of selling new Chevrolet motor vehicles and chassis and the privilege of using the word "Chevrolet" and the Chevrolet trade-mark or trade-marks, including the distinctive outline or form thereof, as applied to Chevrolet motor vehicles and chassis, parts and accessories.

## 2. Handling of Dealer's Orders

### A. Three Months' Estimate of Requirements

Dealer will, unless otherwise advised by Seller, furnish Seller for its general guidance every month, on the date specified by Seller, but not later than the sixth day of each month, an estimate, on forms provided by Seller, of his requirements of new Chevrolet motor vehicles and chassis for the three (3) calendar months next following, each month's estimate to be shown separately.

\* \* \*

### C. Orders

Dealer's orders for Chevrolet motor vehicles and chassis shall be submitted upon order forms supplied by Seller, at intervals mutually satisfactory. If, however, in any month Seller does not ship the standard products which were scheduled for delivery during that month, the orders for such undelivered standard products will remain in effect unless cancelled in whole or in part by either Seller or Dealer upon written notice served by the one upon the other.

\* \* \*

## 12. Dealer's Place of Business Satisfactory to Seller

Dealer will maintain a place of business including salesroom, service station, parts and accessories facilities, and used car facilities satisfactory to Seller and will maintain the business hours customary in the trade. Dealer will permit Seller to



inspect said place of business at all reasonable times in business hours.

Dealer will not move to or establish a new location, branch sales office, branch service station or place of business including any used car lot or location without the prior written consent of Seller.

\* \* \*

#### 14. Capital Requirements

Since the amount and structure of working capital and net worth required to handle properly the business to be conducted by Dealer hereunder depends upon many factors, including size of market, sales and service facilities required, anticipated volume and others and since Seller has set standards for Dealer capital and net worth based on Seller's past experience, Dealer shall establish his owned net working capital and net worth in the respective amount and form specified by Seller. If the amount of owned net working capital or net worth or the way in which either is set up is now or hereafter inadequate in Seller's estimation for the proper handling of Dealer's business, Dealer will take the necessary steps to meet Seller's applicable requirements within the time determined by Seller.

\* \* \*

#### F. Mechanical Staff

Employ a sufficient number of competent mechanics to meet adequately the service requirements of the Chevrolet owners in Dealer's zone of influence.

\* \* \*

## J. Inspection of Facilities

Permit Seller to inspect and check over Dealer's service facilities and stock of parts and accessories at any reasonable time in business hours.

## 22. Signs

Dealer will purchase, erect, and maintain at his expense the following signs as hereinafter specified:

A. A standard product electric sign in a conspicuous place outside his showrooms provided the erection thereof is not prohibited by municipal ordinance or statute.

B. A standard authorized service sign in a suitable location on the outside of Dealer's place of business.

C. Such other signs as are necessary to advertise his business properly on a basis mutually satisfactory to both Seller and Dealer.

\* \* \*

## 24. Advertising Fund

In order to give to Chevrolet dealers the advantages of a comprehensive and coordinated dealer advertising program, an Advertising Fund, composed of a dealer portion and a factory portion, has been established and is administered by Seller for the purpose of supporting such a program.

### A. Dealer Portion of Fund

Seller will collect the sum of Twelve Dollars (\$12.00) for each new Chevrolet motor vehicle and

chassis purchased and paid for by Dealer, and such sums will be credited to the dealer portion of the Advertising Fund for the account of Dealer.

The amounts contributed by Dealer shall be used solely in paying the cost of local advertising, including preparation expense, in Dealer's territory through such local advertising media as, in the judgment of Seller, will benefit Dealer. If a dealer desires to participate in local advertising in a community outside his zone of influence, he may do so provided that he shall have secured the consent in writing of the dealer or dealers in whose zone of influence such community is located, and shall have reached an agreement in writing as to the amount per car which is to be taken out of his contributions to the Advertising Fund and applied to such advertising. A copy of said consent and agreement shall be furnished to Seller.

All local advertising to be paid for out of the dealer portion of the Advertising Fund shall carry the name and address of Dealer except that if, in the judgment of Seller, that is impractical, a suitable group reference will be used.

Contributions to said Fund shall be accounted for separately. However, contributions to the Fund shall be credited to the Fund for the joint account of all dealers involved where two or more Chevrolet dealers are located in the same city or town or where one or more dealers are located in a community suburban to a large city and in the judgment of Seller advertising in said large city substantially



covers such suburban community, or where two or more dealers are located within a group of communities which, in the judgment of Seller, may be considered as a common area for purposes of local advertising; contributions by all other dealers shall be credited to the Fund for the separate account of each dealer involved.

With respect to contributions of dealers located in cities, towns, or communities as aforesaid, which are credited to the Fund for the joint account of the dealers involved, the unspent portion, if any, of any such dealer's contribution, upon termination of this Agreement, shall remain in said joint account and shall be used in the payment of the cost of local advertising and not refunded to Dealer. With respect to contributions of all other dealers which are credited to the Fund for the separate account of each such dealer, the unspent portion, if any, of any such dealer's contribution, upon termination of such dealer's Selling Agreement, shall be refunded to such dealer.

As soon as practicable after the close of each calendar year during the term of this Agreement, or in the event of termination of this Agreement, as soon as practicable after the effective date of termination, Dealer shall be furnished with a statement of his account in dealer portion of said Fund or of the joint account to which he has contributed. Such statement shall show the total advertising expenditures by media classification charged against said account, the total collections and the resulting

balance, and in the case of a joint account, the amount of the individual contribution of Dealer.

**B. Factory Portion of Fund**

Seller will pay into the Advertising Fund the sum of Three Dollars and Seventy-five Cents (\$3.75) for each new Chevrolet motor vehicle and chassis purchased and paid for by Dealer, and such sum will be credited to the factory portion of the Advertising Fund.

The factory portion of the Fund may be used by Seller for advertising of such type in such media and at such time and place as, in the opinion of Seller, will most effectively serve the dealer need or interests as determined by Seller.

Admitted October 31, 1950.

\* \* \*

**JACKSON HOWELL**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

**Direct Examination**

By Mr. Nutter:

Q. Mr. Howell, what is your occupation?

A. An automobile dealer.

Q. And do you have any occupational classification with the Respondent Howell in this case?

A. President of Howell Chevrolet Company.

(Testimony of Jackson Howell.)

Q. I see; and where is that located?

A. 1000 South Brand, Glendale.

Q. Now, Mr. Howell, just for the purposes of later testimony [18] in the case, can you describe the plant for us at the Howell Chevrolet Company—what it includes? Can you tell us the location of the various departments? I believe you have a new car sales room and you have a service room, et cetera.

A. We have a new car sales room, a parts department, a service department, lubrication department, body shop, all adjacent to 1000 South Brand.

Q. I see. That covers about a half a block, does it not, of that area?

A. It is about a half a block.

Q. And do you also have used car lots?

A. Yes.

Q. And are they located immediately adjacent or are they somewhere else on the street?

A. No. One of them is at 919 South Brand.

Q. I see. What is that? Diagonally across from your main plant there?

A. It is across the street and north.

Q. And do you have any others?

A. Then we have another lot at 1100 South Brand.

Q. Another used car lot?

A. Used car lot.

Q. Now, these various departments of the Howell Chevrolet Company—are they divided into de-



(Testimony of Jackson Howell.)

partments? Do you have a foreman or do you have a service manager? Can you tell me how [19] that works?

A. Yes. We operate with a sales manager on new cars, a parts manager in charge of the parts department, a service manager in charge of the service department with a body shop foreman under his jurisdiction, and a used car manager.

Q. I see. Now, what jurisdiction does the service manager have? Is he in charge of servicing of new cars and used cars or just new cars?

A. He is in charge of the servicing of new cars servicing the customer cars. [20]

\* \* \*

Q. (By Mr. Nutter): Now, Mr. Howell, you said previously you had a service manager. What is his name? A. Bordeau.

Q. And you said you had a body shop foreman.

A. That is right.

Q. And what is his name? A. Pope.

Q. And is he a new man? A. Pope, yes.

Q. And was there a man previous to him?

A. Yes, Frank Hogan.

Trial Examiner Myers: What is Mr. Pope's first name?

The Witness: Lauren.

Trial Examiner Myers: And what is the other gentleman's first name—Bordeau's?

The Witness: Fred.

(Testimony of Jackson Howell.)

Q. (By Mr. Nutter): Was Frank Ogen the body shop foreman in February and March of 1950?

A. I believe he was.

Q. Now, during the year 1949, Mr. Howell, did you ship any Chevrolet motor cars or trucks directly outside the State of California?

A. Not to my knowledge. [23]

Q. During the year 1950 did you ship any Chevrolet motor cars or trucks directly outside the State of California?

A. Not to my knowledge.

Trial Examiner Myers: When you say shipped you mean sold and shipped?

Mr. Nutter: Sold.

Q. (By Mr. Nutter): Did you sell any to any customers in Nevada or Arizona or outside the State of California during the year 1949?

A. I don't believe so.

Q. How about the year 1950?

A. I don't believe we did.

Trial Examiner Myers: During those years did you sell and ship to anybody located outside the State of California? I mean any automobiles or trucks.

The Witness: No. [24]

\* \* \*

(The documents heretofore marked General Counsel's Exhibits Nos. 6 and 7 for identification were received in evidence.) [26]

## GENERAL COUNSEL'S EXHIBIT No. 6

MAdison 9-1411

October 6, 1950

Henry M. Hogan, General Counsel,  
General Motors Corporation,  
3044 West Grand Boulevard,  
Detroit, Michigan.

Re: Howell Chevrolet Co. and International  
Association of Machinists, District  
Lodge #727  
Case No. 21-CA-794

Harbor Chevrolet Co. and/or Harbor  
Realty and Finance Co. and/or Harbor  
Chevrolet Corp. and International Asso-  
ciation of Machinists  
Case No. 21-CA-795

Dear Sir:

Please be advised that a hearing will be held in the above cases at 111 West Seventh Street, Los Angeles, California, on October 31, 1950, at 10:00 a.m. One of the subjects under investigation at this hearing will be the extent and nature of the operations of the above companies in connection with their dealership in Chevrolet products.

In the past, counsel for the Company, Frederick A. Potruch, has been unwilling to furnish this office with information concerning the extent of operations of above companies. I am further informed that the desired information is not obtainable at the



Van Nuys plant but is available in the General Accounting Office, General Motors Corporation, Detroit, Michigan.

It is my thought that if this information is furnished to me in the form of a letter from your office, all parties may be willing to stipulate as to the accuracy of the facts supplied by you and it will not be necessary to require the attendance of your officials by subpena. In this way the inconvenience and cost of obtaining direct testimony on this subject may be avoided. Needless to say, the information which you supply will be used solely as evidence in the above cases only.

I have attached a list of items and questions, answers to which will satisfy our needs. Since the date of hearing is not far off, I will appreciate your early reply. I am aware of the fact that you have furnished like information to this office in the past and would appreciate answers in as much detail as you can give us.

Thank you for your courtesy and cooperation with me in this matter.

Very truly yours,

RALPH H. NUTTER,

Attorney.

Enclosure:

Questionnaire

Air Mail

Special Delivery

RHN/sm

## List of Items and Questions

Refer to letter dated October 6, 1950

1. What general type of products are shipped to the Van Nuys, California, Fisher Body and Chevrolet Divisions, General Motors Corporation by General Motors Corporation from outside State of California?
2. Where are these products manufactured and from what places are they shipped?
3. The approximate gross value of such shipments during the past calendar year or fiscal period.
4. A statement of:
  - a. The general nature of the operation carried on by the above-mentioned Van Nuys divisions and other plants, supplying above dealers.
  - b. What products are shipped from these divisions to the above dealers? Products shipped from other plants of Chevrolet Division to these dealers.
  - c. The gross value of the products shipped to these dealers during the past calendar year or fiscal period.
  - d. The gross value of products shipped to Van Nuys, California, plants, Chevrolet Division of General Motors Corporation, during the past calendar year or fiscal period. The origin of such products.

e. The approximate gross value of the products, so shipped directly from outside State of California to Howell Chevrolet, Harbor Chevrolet Co. and/or Harbor Chevrolet Corp. and/or Harbor Realty & Finance Co. during the past calendar year or fiscal period.

f. To whom do the said companies make payment for the products shipped to them as indicated hereinabove.

g. With whom do the said companies place orders for the said products.

5. Whether Howell Chevrolet, Harbor Chevrolet Co. and/or Harbor Chevrolet Corp. and/or Harbor Realty & Finance Co., pursuant to franchise, contracts or other agreements or licenses, use the facilities and services of the General Motors Acceptance Corporation for the purpose of financing Chevrolet products sold by said companies, and if so, the nature and extent of such usage.

6. Whether the above companies contribute to a common General Motors advertising fund.



*National Labor Relations Board*

General Motors Corporation  
General Motors Building

3044 West Grand Boulevard  
Detroit 2, Michigan

October 25, 1950.

Mr. Ralph H. Nutter, Attorney,  
National Labor Relations Board,  
Twenty-First Region,  
111 West 7th Street,  
Los Angeles 14, California.

Subject: Howell Chevrolet Co. and International Association of Machinists,  
District Lodge #727—Case No.  
21-CA-794.

Harbor Chevrolet Co. and/or  
Harbor Realty and Finance Co.,  
and/or Harbor Chevrolet Corp.  
and International Association of  
Machinists—Case No. 21-CA-795.

Dear Mr. Nutter:

This is in response to your letter of October 1950, in connection with the above-subject cases.

Hereinafter you will find answers to the questions attached to your letter of October 6. The answers are submitted in the same order as listed in the attachment to your letter:

1. Motor Vehicle Production Parts, Service Parts and Accessories.

2. Manufactured and shipped from all parts of the United States.

3. In excess of \$5,000,000.00 from October 1, 1949, to September 30, 1950.

4. (a) Motor Vehicles are assembled and sold from assembly plants, and Service Parts and Accessories are sold from warehouses.

(b) Motor Vehicles, Service Parts and Accessories.

(c) From October 1, 1949, to September 30, 1950—

Howell Chevrolet—In excess of \$1,500,000.00 but less than \$2,000,000.00.

Harbor Chevrolet Co.—In excess of \$500,000.00 but less than \$1,000,000.00.

Harbor Chevrolet Corp.—In excess of \$500,000.00 but less than \$750,000.00.

(d) In excess of \$5,000,000.00 from October 1, 1949, to September 30, 1950. Shipped from all parts of the United States.

(e) From October 1, 1949, to September 30, 1950—

Howell Chevrolet—In excess of \$750.00 but less than \$1,000.00.

Harbor Chevrolet Co.—In excess of \$1,000.00 but less than \$1,200.00.

Harbor Chevrolet Corp.—In excess of \$500.00 but less than \$750.00.

(f) To General Motors Corporation or if purchases are being financed, to the party who has title to such products.

(g) Motor Vehicles—Chevrolet Motor Division General Motors Corporation.

Parts and Accessories—General Motors Parts Division, General Motors Corporation.

5. Howell Chevrolet, Harbor Chevrolet Co., and Harbor Chevrolet Corp. have used or do use the facilities and services of General Motors Acceptance Corporation. The nature and extent of such usage can be ascertained from the named companies.

With reference to the request set forth in your letter of October 18, 1950, for copies of the Dealer Selling Agreements between Chevrolet and the Howell and Harbor companies, we suggest that you arrange with the dealers to have the originals which have been submitted to you photostated in order that the latter may be offered in evidence in lieu of the originals.

Very truly yours,

/s/ HENRY M. HOGAN,  
General Counsel.

HSB/mj

cc: F. A. Potruch

Admitted October 31, 1950.



GENERAL COUNSEL'S EXHIBIT No. 7

Telegram

Official Business—Government Rates

From .....  
Bureau .....  
Chg. Appropriation .....  
ja .....  
October 31, 1950.

Ralph H. Nutter,  
Attorney, 21st Region,  
NLRB, Los Angeles, Calif.

Regarding Howell Chevrolet Company, Case No. 21-CA-794, the Following Information Is Furnished Pursuant to the Telephone Discussion Which You Had With Benjamin of My Staff on October 30 and in Response to Your Teletype of the Same Date. The Information Has Been Prepared on a Basis Comparable to That Used in Furnishing the Board With Similar Information in 1948 for the Highland Park Chevrolet Company, Case No. 21-RC-555. For the Period From October 1, 1949, to September 30, 1950, Inclusive, Approximately 57 Per Cent of the Components of Chevrolet Motor Vehicles Assembled by the Chevrolet Motor Division at Its Van Nuys, California, Plant Were Purchased From Within the State of California. For the Same Period, the Remaining Approximately 43 Per Cent of the Components of Chevrolet Motor Vehicles Assembled by the Chevrolet Motor Division at Its Van Nuys, California, Plant Came From Sources Outside of the State of California. In Con-

nection With Question 6 in the List of Questions Attached to Your Letter of October 6, Please Be Advised That the Company Therein Referred to Did Not or Do Not Make Contributions to a Common General Motors Advertising Fund but Did or Did Not Make Contributions to a Local Dealer Advertising Fund Which Is Used for Local Purposes. It Is Our Understanding That by Furnishing the Foregoing Information It Will Not Be Necessary for the Subpoenaed Van Nuys General Motors Representative to Appear. For Your Information, a Copy of This Message Is Being Sent to Mr. Potruch Who Represents Howell Chevrolet.

HENRY M. HOGAN.

Admitted October 31, 1950.

\* \* \*

Mr. Nicoson: Prior to recalling of the witness if your Honor please, I am informed by Mr. Nuttall that he has concluded his proof on the question of commerce. We therefore wish to make a motion at this time to dismiss the entire case on the ground that there is no evidence before your Honor to prove jurisdiction within the recent decisions of the National Labor Relations Board. And I would like also your Honor's permission to argue this a little at length. [27]

\* \* \*

Trial Examiner Myers: Well, I will still reserve decision on the motion to dismiss. I think we ought to proceed with the issues involved. [3]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 8 for identification was received in evidence.) [40]

GENERAL COUNSEL'S EXHIBIT No. 8

Howell Chevrolet Co.

Payroll, Feb. 1, 1950—Mechanics, Painters, etc.

Herbert Hinz .....	Parts Man
Wm. Nevins .....	Parts Man
Harley Barnum .....	Mechanic
Ralph Beaty .....	Mechanic
Henry Gibelman .....	Mechanic
Iver Hopperstad .....	Mechanic
Lawrence Malstrom .....	Mechanic
Claud Leonard .....	Mechanic
Wm. Schoene .....	Mechanic
Joseph Price .....	Mechanic
Joseph Sciolora .....	Mechanic
Wm. Blakeley .....	Mechanic
Dolye Christian .....	Mechanic
Lee Fitzhugh .....	Mechanic
Kenneth Herrick .....	Mechanic
George Kirkland .....	Mechanic
Philip Caballero .....	Painter
Rudyard Cole .....	Trim Man
Philip Molen .....	Trim Man
Frank Ogan .....	Body Man
Paul Arnold .....	Body Man
Ed Daly .....	Body Man
Joseph Rose .....	Body Man
Rowland Bordeau .....	Lube Man



Robert Reeve .....Lube M  
Malvin Paschal .....Lot B  
Boyce Skelton .....Delivery B  
Richard Wells .....Car Wash  
Edward Anthony .....Service Write Up M

Admitted October 31, 1950.

\* \* \*

(The documents heretofore marked General Counsel's Exhibit No. 9 for identification were received in evidence.)

\* \* \*

### CLAUDE LEONARD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Nutter:

Q. Mr. Leonard, what is your occupation?

A. Auto mechanic.

Q. And how long have you been an auto mechanic?

A. About 25 years.

Trial Examiner Myers: For the past 25 years.

The Witness: For the past 25 years.

Q. (By Mr. Nutter): Will you briefly relate to Mr. Leonard, [41] your experience as an auto mechanic?

A. Well, all-around mechanic, in any—most

(Testimony of Claude Leonard.)

Chevrolet automobiles, and I can do anything on any of those.

Q. When did you first start out as an auto mechanic? Where was it?

A. St. Louis, Missouri.

Q. And what were your duties there?

A. Mechanic.

Q. In a garage there?

A. I was a mechanic for several years there.

Q. And what were your duties there?

A. Well, just all-around mechanic — brakes, front end, line mechanic, that is working on the motors, line mechanic.

Q. What are the duties of a line mechanic?

A. Well, that is work on motors, transmissions, rear ends, grinding valves.

Q. Did you say you worked on brakes, also?

A. Brakes.

Q. And did you also do any alignment?

A. Front end work.

Q. I see; and what did that consist of?

A. Well, lining up the front end, kingpins, pivot pins, upper and lower pivot pins.

Q. And did you tell us where you were first employed? Did you say it was St. Louis? [42]

A. St. Louis.

Q. And you were employed in an agency garage here—or what was it?

A. I worked five years for an independent. He used to be with General Motors. He specialized with Chevrolets.

(Testimony of Claude Leonard.)

Q. Then what did you do after that?

A. Well, I had my own shop for three years.

Q. Had your own shop in St. Louis?

A. It was about six miles from the city limit on Highway 61.

Q. And what kind of repair did you do at your own shop?

A. All kinds.

Q. All kinds?

A. That I could handle. I didn't handle big things, just a small size shop.

Q. I see. Now, did you subsequently move to California?

A. Yes.

Q. And how long ago was that?

A. Eight years ago.

Q. Now, have you been employed as an automobile mechanic in California?

A. Yes, sir.

Trial Examiner Myers: Well, what happened in the meantime? You only told us about eight years in St. Louis and eight years here. That's 16. [43]

The Witness: Well, I had worked for automobile companies there. You know, doing the—year mean from the time—well, I had my own shop. When I gave that up I came out here.

Trial Examiner Myers: You had your own shop starting around 1939 to 1940?

The Witness: Yes; longer than that.

Trial Examiner Myers: What? I think the dates—when did you give up your shop in St. Louis?



(Testimony of Claude Leonard.)

The Witness: '41.

Trial Examiner Myers: And you came out here?

The Witness: Yes.

Trial Examiner Myers: You have been here ever since?

The Witness: Yes.

Trial Examiner Myers: What did you do then? In 1941 you gave up your shop and you had it for three years. That takes us back to 1938. Is that right?

The Witness: Yes, '38.

Trial Examiner Myers: What did you do? You worked five years for this independent man?

The Witness: That is right.

Trial Examiner Myers: That takes us back to about 1933?

The Witness: You want to know where I worked before that?

Trial Examiner Myers: Yes, where were you before 1933? Or, if you would rather put it the other way, it is all right with me, that is, from 1925 on. [44]

Q. (By Mr. Nutter): If you have been a mechanic since 1925, what did you do in the years between 1925 and 1933? Do you recall that? Did you work as an auto mechanic?

A. Yes. I was trying to figure when I left there. In 1927 I worked for Southside Chevrolet.

Trial Examiner Myers: As what?

The Witness: Mechanic.

(Testimony of Claude Leonard.)

Q. (By Mr. Nutter): How long did you work for Southside Chevrolet?

A. I didn't work there too long—probably about a year.

Q. And then did you work for any other garage or dealers between 1927 and 1933?

A. I had one independent shop for three years.

Q. Can you recollect what years those were?

A. 1929 to 1933—Ben's Auto Repair.

Trial Examiner Myers: Was that in St. Louis?

The Witness: That was in St. Louis.

Q. (By Mr. Nutter): Now, can you recollect where you worked between 1925 and 1927?

A. '25 and '27?

Q. Yes. Well, if you just cannot recollect—

A. Then I was trying to figure the dates. I worked for my uncle in a service station and repair shop. That was about 1926; worked for him about two years. No, about 1925 it was, the same year I got married. That ought to be easy to [45] remember.

Q. That just about covers it. Now, when you came to California, what did you do when you came to California?

A. Well, the first job I got was with a Chevrolet dealer, Pollard-Ravenscroft in Van Nuys.

Q. How long did you work for them?

A. From March until July, I believe it was.

Trial Examiner Myers: In what year was that?

The Witness: In 1943, I guess.

(Testimony of Claude Leonard.)

Q. (By Mr. Nutter): Did you work for any other companies?

A. From there I went to Howell Chevrolet in Glendale.

Q. When did you work at Howell?

A. How long?

Q. Yes. A. A little over a year.

Q. When did you start to work at Howell?

A. Well, it was in June, I believe.

Q. Of what year?

A. Must have been 1944, '44 I believe.

Q. And what were your duties at Howell Chevrolet? A. Lineman.

Q. Lineman? A. Line mechanic.

Q. And what did you do as a line mechanic?

A. Oh, worked motors, and part of the time whatever you was given to do, why, you done. You know, if you were able to do [46] it.

Q. Well, could you tell us the kind of work you did?

A. Well, overhauling motors, transmissions, rear ends, relining brakes.

Q. Anything else?

A. Occasionally we done front end work on the line.

Q. How long did you work at Howell starting in June of 1944?

A. A little over a year I believe it was. That is the best of my knowledge. I don't know just exactly the date I left there.



(Testimony of Claude Leonard.)

Q. And then what did you do?

A. I went with an independent shop. He used to be general manager at Howell's Chevrolet. He opened up his own business.

Trial Examiner Myers: What is his name?

The Witness: William Reilly.

Trial Examiner Myers: Where was he located?

The Witness: Broadway and Louise in Glendale.

Q. (By Mr. Nutter): Do I understand that this general manager of service at Howell opened up his own shop and you went with him to work with him, is that right? A. Yes, sir.

Q. And how long did you work with him?

A. A little over two years.

Q. And how did you happen to leave his employment?

A. Well, I got a better job—I thought I did, anyway. [47]

Q. Where was that?

A. Martin Pollard Chevrolet.

Trial Examiner Myers: Whereabouts?

The Witness: In North Hollywood.

Q. (By Mr. Nutter): Now, when you worked for William Reilly in Glendale what were your duties? A. I was doing everything there.

Q. Well, will you tell us what you were doing?

A. Motor work, transmission, rear ends, tune up, brakes, front end—no body work.

Q. And what were your duties at Martin Pollard Chevrolet? A. I was on the line there.

(Testimony of Claude Leonard.)

Q. And what were your duties on the line?

A. Motors, transmissions, rear ends, valves.

Q. Anything else?

A. That is all over there.

Q. And did you leave Martin Pollard?

A. Yes, sir.

Q. When did you leave them?

A. In January of 1948.

Q. And where did you go?

A. Back to Howell Chevrolet.

Q. And what were your duties at the Howell Chevrolet?

A. I went to work there as a brakeman.

Q. And what were your duties as a [48] brakeman?

A. Reline brakes, overhaul wheel cylinders and master cylinders or anything pertaining to the braking system.

Q. Did you do any other work at the Howell Chevrolet besides the brake work and cylinder work?

A. Yes, sir.

Q. What was it?

A. Oh, they had a front end man there that he wasn't on the job all the time—you know, he was off, sickly. So I taken his place different times—also when he was on his vacation.

Q. What was that man's name?

A. Al Crowley.

Q. And when was that that you did some of this alignment work?

(Testimony of Claude Leonard.)

A. June in 1949. I think Al left there when he came back off his vacation. That must have been around in August.

Q. August, 1949?

A. I am not sure now, because I don't know when he took his vacation. All I know is what I did.

Q. Then how long did you work at Howell after that?

A. Until March 31, 1950.

Q. March 31, 1950? What happened on that date?

A. I was laid off.

Q. I see. Now, while you were employed at the Howell Chevrolet did you take any courses given in mechanics, on operations, or anything of that [49] sort?

A. We take examinations once a year.

Q. What kind of an examination is that?

A. Well, they call it a General Motors examination. They issue you a diploma.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 10 for identification.)

Q. (By Mr. Nutter): I show you a document, Mr. Leonard, that I have had marked as General Counsel's Exhibit No. 10, and ask you if you could tell me what that is.

A. That is your diploma that you get after you pass the examination.

Q. What examination is that?



(Testimony of Claude Leonard.)

A. Well, it is a list of questions that are asked you and you answer them and you have to pass a grade of 70 or better.

Q. Where did you take this examination?

A. This examination was taken at the Glendale Hotel.

\* \* \*

Q. (By Mr. Nutter): You took this examination when? [50]

A. You usually take them around in April or June. There is no certain time.

Q. When did you take the examination for this certificate? A. That? I don't know the date.

Q. I mean approximately.

A. Approximately around April.

Trial Examiner Myers: Of what year?

Q. (By Mr. Nutter): April of what year?

A. 1950.

Q. 1950. Now, I notice that on the certificate where it says the ninth year. A. That is right.

Q. Can you tell me what that is?

A. Then '49 was my eighth year, '48 was my seventh year.

Q. Do I understand that you have taken nine such examinations?

A. Nine consecutive examinations.

\* \* \*

Q. (By Mr. Nutter): Now, when you were em-

(Testimony of Claude Leonard.)

ployed at the Howell Chevrolet did you take such an examination for the eighth year?

A. Yes, sir. [51]

Q. And where did you take such an examination?

A. It was taken on Washington Avenue.

Q. In what city?

A. Here in Los Angeles.

Q. Did you take that—

A. Roger Young Auditorium.

Q. And that is while you were employed at Howell Chevrolet?

A. That is right.

Q. And did you get that certificate—

Trial Examiner Myers: You mean the first time or the second time?

The Witness: In '48—the eighth time.

Q. (By Mr. Nutter): And did you receive a certificate for that examination when you worked for Howell Chevrolet?

A. That is right.

Q. The eighth year you took it?

A. The eighth year.

Q. Was it similar to this one?

A. Just like this, only it got 1949 where this says 1950.

Q. How did you happen to take that examination while you worked at Howell?

A. Well, they asked me to go down and take them.

Q. Who asked?

A. The boss. [52]

(Testimony of Claude Leonard.)

Q. When you work on the line do you post such a certificate above your stall?

A. Some do and some don't.

Trial Examiner Wyers: Did you?

The Witness: No.

Q. (By Mr. Nutter): And is it your testimony that you have taken nine such examinations and received certificates showing that you are a Chevrolet approved mechanic? Is that correct?

A. That is right.

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 10 for identification was received in evidence.)

## GENERAL COUNSEL'S EXHIBIT No. 10

Chevrolet Approved Mechanic  
1950

To all to whom these presents shall come: Greetings

Be it known that

Claude Leonard

has completed the Course of Training as prescribed by the Chevrolet Motor Division, General Motors Corporation, for those engaged in Performing Service Operations on Chevrolet Motor Cars and Trucks. This Certificate has been issued as an Award of Merit for having successfully completed this course of instruction.



(Testimony of Claude Leonard.)

In testimony whereof I hereby affix my signature.

/s/ E. L. HARRIG,

Manager Service and

Mechanical Department.

SUPER CHEVROLET  
SERVICE.

NATIONAL LABOR  
RELATIONS BOARD.

Ninth Year.

Received in evidence October 31, 1950.

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Q. (By Mr. Nutter): Now, Mr. Leonard, while you were employed at the Howell Chevrolet did you join any union? A. Yes, sir. [53]

Q. What union was that?

A. International Association of Machinists.

Q. And can you tell us when you joined the union?

A. About January 23rd, I believe, of 1950.

Q. I see. Now, did you hold any kind of an office in the union?

(Testimony of Claude Leonard.)

A. I was shop steward, senior chairman.

Q. And how did you happen to be senior chairman?

A. By vote of the employees at Howell Chevrolet.

Q. And when was that vote taken?

A. I believe that was on January 30th, as well as I remember.

Q. And you say that you—well, did you attend a meeting of Howell employees on January 30, 1950?

A. That is right.

Q. And where was that meeting held?

A. That is the Local Hall in Van Nuys.

Q. Local Hall of the IAM?

A. That is right.

Q. Can you tell us who was present at that meeting?

A. Well, I could tell you a few from Howell Chevrolet.

Q. Yes, that is what I want.

A. There was George Kirkland, Lee Fitzhugh, Bill Barnum.

Q. Anybody else that you recall?

A. That is all I can think of—and myself—that is all I can think of right now. [54]

Q. Were there any other Howell employees there?

A. At that meeting?

Q. Were there any you cannot remember? Do you recall if there were others there?

Trial Examiner Myers: If you thought there

(Testimony of Claude Leonard.)

were others present, though you do not remember their names.

The Witness: Yes, there were some more there, though I cannot recall their names.

Trial Examiner Myers: About how many more?

The Witness: About four.

Trial Examiner Myers: That makes about seven of you being present?

The Witness: About eight of us there.

Trial Examiner Myers: Eight?

The Witness: Yes.

\* \* \*

Q. (By Mr. Nutter): Now, I have had marked for identification General Counsel's Exhibit No. 11, an authorization card. I will show you that and ask you to tell me what that is.

A. It is an authorization card from the Labor Board to hold an election.

Q. I will ask you if you can identify it. Notice there is a signature there. Can you tell me whose signature that is?

A. Lee Fitzhugh's. [55]

Q. Can you tell me whether you saw that signature made at this meeting you referred to?

A. Yes, I saw him signing the card.

Q. Can you tell us the circumstances about how the card was signed?

A. Well, he just filled it out.

Q. The cards were passed out and you fellows filled them out? Is that it?



(Testimony of Claude Leonard.)

A. The cards were passed out.

Q. And were you present when this one was filled out?

A. I was.

Q. This was at the meeting at the IAM hall?

A. Yes.

Q. And you recognize his signature?

A. Yes. [56]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 11 for identification was received in evidence.)

#### GENERAL COUNSEL'S EXHIBIT No. 11

##### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No. . . . . , Clock  
No. . . . . , Shift No. . . . . , Plant No. . . . .

Home Address—St.: 1610 W. Glenoaks.

City: Glendale.

Tel. No.: CI 3783.

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power or

(Testimony of Claude Leonard.)

authority heretofore given to any person or organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 30, 1950.

/s/ LEE E. FITZHUGH.

(Signature of Employee.)

LEE E. FITZHUGH.

(Please Print Name.)

Admitted October 31, 1950.

\* \* \*

Q. (By Mr. Nutter): Now, I have had marked for identification a card, an authorization card, as General Counsel's Exhibit No. 12. I show you this card here with a signature, H. William Barnum. Do you recall that? A. Yes, sir.

Q. When was that signed?

A. That was signed at the hall the night of the meeting.

Q. At the IAM hall? A. IAM hall.

Q. That was signed January 30th, was it?

A. That is right. [57]

\* \* \*

Q. And tell us the circumstances. Were you present when——

A. I was. The cards were passed out and William Barnum signed it.

Q. And where were you when it was signed?

(Testimony of Claude Leonard.)

A. Right there with them.

Q. With whom?

A. Barnum, Lee Fitzhugh.

Q. And did you see Barnum sign the card?

A. Yes, sir. [58]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 12 for identification was received in evidence.)

## GENERAL COUNSEL'S EXHIBIT No 12

### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No. . . . . , Clock  
No. . . . . , Shift No. . . . . , Plant No. . . . .

Home Address—St.: 3345 $\frac{1}{2}$  Sunnynook Dr.

City: Los Angeles, 39.

Tel No.: . . . . .

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power or  
authority heretofore given to any person or organi-  
zation to represent me.



(Testimony of Claude Leonard.)

This does not obligate me financially in any way.

Date: Jan. 30, 1950.

/s/ WILLIAM BARNUM.

(Signature of Employee.)

H. WILLIAM BARNUM.

(Please Print Name.)

Admitted October 31, 1950.

---

Q. (By Mr. Nutter): Now, did you go to work the next day at Howell Chevrolet?

A. Yes, sir.

Q. Did you wear any union button?

A. Yes, sir.

Trial Examiner Myers: IAM button?

The Witness: IAM button.

Q. (By Mr. Nutter): What does it say on the button?

A. Just International Association of Machinists.

Q. Is that all it contains? A. 727.

Q. 727? What does that refer to? [59]

A. That is District Local 727.

Q. Was there anything else on the button?

A. No; on the one I wore. On the——

Trial Examiner Myers: Well, we are only asking you about the one you wore.

Q. (By Mr. Nutter): Yes, the one you wore.

A. The one I wore.

(Testimony of Claude Leonard.)

Q. Yes. A. "Senior Chairman," IAM.

Q. Well then, did other people wear buttons in the shop, too? A. Yes, sir.

Q. Who else wore buttons?

A. Well, the next day there was Fitzhugh, Barnum and Kirkland, and there were a few more signed up that morning. They started wearing buttons, too,—Philip Caballero and Kenny Herrick.

\* \* \*

Q. (By Mr. Nutter): Now, I will show you a card that I have had marked as General Counsel's No. 13, and ask you if you recognize that.

A. Yes, sir.

Q. Can you tell us about that?

A. Well, that is Richard Wells. He signed that in the morning of the 31st; that was at the meeting.

Q. And could you tell us the circumstances, the time and [60] place and who were present?

A. Right there in his car.

Q. In his car? A. Yes.

Q. I mean, was he seated in his car?

A. Yes.

Q. What time of day was that?

A. In the morning, around 7:30, 7:45.

Trial Examiner Myers: Where was the car located?

The Witness: Parked at the side of Howell Chevrolet.

Q. (By Mr. Nutter): Well, did you give him the card? A. Yes, sir.

(Testimony of Claude Leonard.)

Q. Oh, you gave him the card? Now, will you tell us what happened from start to finish?

A. I gave him the card and asked him if he wanted to sign up; he knew what was going on there, and I——

Mr. Nicoson: I object to what he knew.

Trial Examiner Myers: Yes, strike it out.

The Witness: He said that he would sign it and so he signed it up there and I give it to him to sign.

Mr. Nicoson: Move to strike what he repeated as Wells having said on the grounds that it is hearsay.

Trial Examiner Myers: Strike it out. You gave him the card and he signed it? Is that right?

The Witness: That is right. [61]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 13 for identification was received in evidence.)

#### GENERAL COUNSEL'S EXHIBIT No. 13

##### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No. . . . . , Clock  
No. . . . . , Shift No. . . . . , Plant No. . . . .

Home Address—St.: 1404 Basilone.

City: Sun Valley.

Tel. No.: . . . . .

hereby authorize the International Association of



(Testimony of Claude Leonard.)

Machinists to represent me as my exclusive Collective Bargaining Agent with respect to wages, hours of employment, and other conditions of employment, in accordance with the provisions of the National Labor Relations Act.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 31, 1950.

/s/ RICHARD A. WELLS.

(Signature of Employee.)

RICHARD A. WELLS.

(Please Print Name.)

Admitted October 31, 1950.

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\* \* \*

Q. (By Mr. Nutter): I have had marked for identification a card as General Counsel's Exhibit No. 14. I show this to you, Mr. Leonard, and ask you if you can identify that. A. Yes, sir.

Q. And what is that?

A. That was Ralph Beaty. He worked on used cars.

Q. Now, will you tell us the time, place and circumstances of the signing of the card? [62]

A. Yes. I give Ralph the card and he signed it while I waited for it right there.

(Testimony of Claude Leonard.)

Q. What time was this?

A. In the morning.

Q. Was this during work or before work?

A. Before work.

Q. About what time?

A. Oh, around a quarter to eight. [63]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 14 for identification was received in evidence.)

#### GENERAL COUNSEL'S EXHIBIT No. 14

##### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept No. . . . ., Clock  
No. . . . ., Shift No. . . . ., Plant No. . . . .

Home Address—St.: 725½ E. Acacia.

City: Glendale.

Tel. No.: CI 20754.

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power  
or authority heretofore given to any person or  
organization to represent me.

(Testimony of Claude Leonard.)

This does not obligate me financially in any way.

Date: Jan. 31, 1949.

/s/ RALPH BEATY.

(Signature of Employee.)

RALPH BEATY.

(Please Print Name.)

Admitted October 31, 1950.

---

Trial Examiner Myers: When were these cards signed—Barnum's and this No. 14?

The Witness: Barnum's was signed on January 30th, and the [64] other two were signed the next day, January 31st. That was the day after the meeting.

\* \* \*

Q. (By Mr. Nutter): I have had marked for identification a card, General Counsel's No. 15. I show you this, Mr. Leonard, and ask you if you can identify it and tell us any circumstances about it?

A. Yes. That is another used car mechanic. I left this card with him in the morning. He brought it over to me at—well, I don't know just what time, but it was before 10:00—signed. I didn't see him sign it.

Q. You left the card with him when?

A. In the morning.

Q. What time, what morning?

A. The morning of the 31st, when I saw Beaty.

Q. Did you give him that card before work?



(Testimony of Claude Leonard.)

A. Yes, sir.

Q. And what did you say to him when you gave it to him?

A. Well, I told him I had a card for him to sign.

Q. And did he take it? A. Yes, sir.

Q. What did he say to you?

A. He said he would sign it and bring it over.

Q. And then you say he brought it over to you? [65]

A. He brought it over sometime before 10:00 o'clock.

Trial Examiner Myers: That same morning?

The Witness: That same morning.

Q. (By Mr. Nutter): He brought it over to you at your place of work, is that it?

A. Yes, sir.

\* \* \*

The Witness: He brought over the card and it was signed. I didn't see him sign it. He didn't sign it in my presence.

Q. (By Mr. Nutter): Did he say anything to you when he handed it to you? A. No.

Mr. Nutter: I now offer General Counsel's Exhibit No. 15 in evidence.

Trial Examiner Myers: Any objection?

Mr. Skagen: No objection.

Mr. Nicoson: Objected to as no proper foundation.

Trial Examiner Myers: I will overrule the objection, and receive the card in evidence; and I will ask the reporter to [66] please mark it as General Counsel's Exhibit No. 15.

(Testimony of Claude Leonard.)

(The document heretofore marked General Counsel's Exhibit No. 15 for identification was received in evidence.)

**GENERAL COUNSEL'S EXHIBIT No. 15**

**Authorization for Representation under the  
National Labor Relations Act**

I, the undersigned, employee of Howell Chev. Co.,  
employed at . . . . ., Dept. No. . . . ., Clock No. . . . .,  
Shift No. . . . ., Plant No. . . . .

Home Address—St.: 1849 San Fernando, R. D.

City: . . . .

Tel. No. . . . .

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power  
or authority heretofore given to any person or  
organization to represent me.

This does not obligate me financially in any way.  
Date: Jan. 31, 1950.

/s/ JOE SCIOLORO.

(Signature of Employee.)

JOE SCIOLORO.

(Please Print Name.)

Admitted October 31, 1950.

(Testimony of Claude Leonard.)

Q. (By Mr. Nutter): I have now marked for identification a card, General Counsel's Exhibit No. 16. I show you the card, Mr. Leonard, and ask you if you can identify that?

A. That is another used car mechanic. I think he was supposed to be the head mechanic over there—Larry Malstrom. I give him this card the same time I give it to Joe. And——

Trial Examiner Myers: On what date?

The Witness: On the 31st of January, 1950.

Q. (By Mr. Nutter): You mean that was in the morning?

A. In the morning, same time I give Joe the card.

Q. You mean the previous card that you gave, General Counsel's 15?

A. Yes, sir. And he said he would sign it, and bring it over.

Mr. Nicoson: Objected to—what he said—and move to strike it on the ground of hearsay.

Trial Examiner Myers: I will strike that.

Q. (By Mr. Nutter): He brought it over to you signed? A. Yes, sir.

Q. And when was that? [67]

A. Before 10:00 o'clock.

Trial Examiner Myers: The same morning?

The Witness: Same morning.

Mr. Nutter: I now offer General Counsel's Exhibit No. 15 in evidence.



(Testimony of Claude Leonard.)

Trial Examiner Myers: When you say "he," whom do you mean?

The Witness: Larry Malstrom.

\* \* \*

Mr. Nicoson: Just a moment, please. We object to this card going into evidence on the ground of no proper foundation being laid. There is no testimony from this witness that the signature on here purports to be, or is in fact any signature placed on there by Mr. Malstrom. All the testimony shows is that he handed him the card on which there is a signature.

Under those grounds there certainly is no foundation to show that this is the signature of Mr. Malstrom or anyone else for that matter. And we will object to it on that ground.

Trial Examiner Myers: Overruled. [68]

\* \* \*

Mr. Nutter: Do you have in your possession the signatures of any of the employees on the pay roll list?

Mr. Nicoson: I think that is immaterial and I refuse to answer the question.

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 16 for identification was received in evidence.)

(Testimony of Claude Leonard.)

GENERAL COUNSEL'S EXHIBIT No. 16

Authorization for Representation under the  
National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at 919 So. Brand, Dept. No....., Clock  
No....., Shift No....., Plant No.....

Home Address—St.: 101 E. Doran.

City: Glendale.

Tel. No.: .....

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power  
or authority heretofore given to any person or  
organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 31, 1950.

/s/ L. A. MALSTROM.

(Signature of Employee.)

L. A. MALSTROM.

(Please Print Name.)

Admitted October 31, 1950.

(Testimony of Claude Leonard.)

Q. (By Mr. Nutter): Now, Mr. Leonard, you worked at the Howell Chevrolet up until March 31st?

A. That is right.

Q. And how were you paid?

A. A commission.

Q. On a commission basis?

A. Yes, sir—40 per cent of the flat rate price.

Q. Forty per cent of the flat rate price of the labor?

A. That is right.

Trial Examiner Myers: You mean 40 per cent of what was charged the customer?

The Witness: Yes, 40 per cent of what was charged to the [69] customer for labor.

Q. (By Mr. Nutter): While you were employed at the Howell Chevrolet did you know a man by the name of Frank Ogen?

A. Yes, sir.

Q. And who is he?

A. Body shop foreman.

Q. Now, you previously testified that you wore an IAM button, a senior chairman button? Is that correct?

A. That is right.

Q. Did you have any conversation with Mr. Hogan about that button?

A. Well, I was out there in the body shop one day at noon; and he told me to get away from him with that button on. He didn't want to get fired.

So I told him there wasn't anybody going to get fired over the buttons.

He said that Mr. Howell told him he was going to fire anybody that joined the union.

Q. And when was this?



(Testimony of Claude Leonard.)

A. Oh, that was—I don't know the date, but it was a week or so after we started wearing our buttons. [70]

\* \* \*

Q. Do you know a man by the name of Mr. Bordeau out at the plant?

A. That was my boss.

Q. He is the service manager?

A. Service manager.

Q. Did Mr. Bordeau ever say anything to you about the union?

\* \* \*

The Witness: Yes.

Q. (By Mr. Nutter): And when and where?

\* \* \*

Trial Examiner Myers: When approximately?

The Witness: It was around, I would say, the last part of February.

Trial Examiner Myers: 1950?

The Witness: 1950. [71]

\* \* \*

Q. (By Mr. Nutter): Now, you say you talked to Mr. Bordeau. Now, where was it?

A. Well, I was talking to a body man——

Q. And who was that?

A. ——out in the body department. George Davis.

Q. And what happened?

(Testimony of Claude Leonard.)

A. Well, we were standing there talking and Mr. Bordeau was standing——

\* \* \*

Q. (By Mr. Nutter): First, you were present with Mr. Davis? A. Yes, sir.

Q. And you were in the body shop?

A. Body department.

Q. About what time of day?

A. It was just before noon.

Q. And was there anyone else present? [72]

A. No.

Q. Was Mr. Bordeau present?

A. He was standing—oh, about fifty feet away, probably.

Q. And what did Mr. Bordeau say to you?

A. Well, he hollered out to me to get away from the man and let him alone, not to bother him with his work. So he didn't have no job at the time; neither did I——

Trial Examiner Myers: Who is "he"?

The Witness: Mr. Davis—and he told me to get away from the man.

Trial Examiner Myers: Now, you have got "he" in there again. Will you tell us who is "he"?

The Witness: Mr. Bordeau told me to get away from Davis and leave him alone, and that he didn't want no union campaigning around there on duty.

So I walked away from him and walked over to Mr. Bordeau and was talking to him and told him

(Testimony of Claude Leonard.)

that I wasn't union campaigning. And he told me I was to quit union campaigning around there or get out.

Q. (By Mr. Nutter): Now, when you were employed there, you stated that you worked on a commission basis. How did that work? Will you explain it to us?

A. Well, for instance, you had a brake reline that would call for ten dollars and a half. That isn't the exact figures, but that is the principal—ten and one-half labor, you know, [73] to reline the brakes. Well, I would get 40 per cent of the ten and a half.

Q. But when you were not working on a car that had been assigned to you, what did you do?

A. Nothing; time was your own.

Q. Well, by whom were you assigned jobs on cars?

A. By the service manager or service salesman.

Q. And then you would go to work on the car and get credit for labor employed on that car; is that right?

A. That is right. [74]

\* \* \*

Q. (By Mr. Nutter): Mr. Leonard, I show you some documents that I have had marked General Counsel's 17-A through 17-F. First, I will show you General Counsel's 17-A and see if you can identify that. Can you tell me what that is?

A. That is the stub for your pay check.

Q. That was received from Howell Chevrolet?

A. That is right.



(Testimony of Claude Leonard.)

Mr. Nicoson: Objected to as leading.

Trial Examiner Myers: Overruled.

The Witness: From——

Mr. Nutter: Pardon——?

The Witness: From Howell Chevrolet in [75]  
1950.

\* \* \*

(The documents heretofore marked General Counsel's Exhibits Nos. 17-A, B, C, D, and E for identification were received in evidence.)



GENERAL COUNCIL'S EXHIBIT ITS NOS. 17-A to 17-E

SAVE THIS STATEMENT OF YOUR EARNINGS AND PAYROLL DEDUCTIONS FOR PERIOD SHOWN BELOW.

GROSS EARNINGS	DEDUCTIONS							TOTAL	NET PAY	PER. END.	CHECK NO.
	S.U.I.	F.O.A.B.	W. TAX	GR. INS.	LIFE INS.	A/C REC.					
96.12	.76	1.44	5.90					8.30	87.82	3/1	1908

19017 (53)  
HOWELL CHEVROLET CO.  
1000 S. BRAND BLVD. — GLENDALE 4, CALIF.

GC 17c

SAVE THIS STATEMENT OF YOUR EARNINGS AND PAYROLL DEDUCTIONS FOR PERIOD SHOWN BELOW.

GROSS EARNINGS	DEDUCTIONS							TOTAL	NET PAY	PER. END.	CHECK NO.
	S.U.I.	F.O.A.B.	W. TAX	GR. INS.	LIFE INS.	A/C REC.					
74.86	.75	1.11	2.90					4.76	69.30	9/15	1853

HOWELL CHEVROLET CO.  
1000 S. BRAND BLVD. — GLENDALE 4, CALIF.

1 GC 17c

SAVE THIS STATEMENT OF YOUR EARNINGS AND PAYROLL DEDUCTIONS FOR PERIOD SHOWN BELOW.

GROSS EARNINGS	DEDUCTIONS							TOTAL	NET PAY	PER. END.	CHECK NO.
	S.U.I.	F.O.A.B.	W. TAX	GR. INS.	LIFE INS.	A/C REC.					
46.68	.46	.70	-					1.16	45.52	2/28	1762

156.68  
HOWELL CHEVROLET CO.  
1000 S. BRAND BLVD. — GLENDALE 4, CALIF.

2 GC 17c

SAVE THIS STATEMENT OF YOUR EARNINGS AND PAYROLL DEDUCTIONS FOR PERIOD SHOWN BELOW.

GROSS EARNINGS	DEDUCTIONS							TOTAL	NET PAY	PER. END.	CHECK NO.
	S.U.I.	F.O.A.B.	W. TAX	GR. INS.	LIFE INS.	A/C REC.					
109.00	1.09	1.64	8.00					10.73	98.27	4/5	1709

HOWELL CHEVROLET CO.  
1000 S. BRAND BLVD. — GLENDALE 4, CALIF.

3 GC 17c

SAVE THIS STATEMENT OF YOUR EARNINGS AND PAYROLL DEDUCTIONS FOR PERIOD SHOWN BELOW.

GROSS EARNINGS	DEDUCTIONS							TOTAL	NET PAY	PER. END.	CHECK NO.
	S.U.I.	F.O.A.B.	W. TAX	GR. INS.	LIFE INS.	A/C REC.					
272.90	1.73	2.59	17.00					22.02	150.88	3/1	1625

338.58  
HOWELL CHEVROLET CO.  
1000 S. BRAND BLVD. — GLENDALE 4, CALIF.

4 GC 17c

Admitted October 31, 1950.

GENERAL COUNCIL'S EXHIBIT 17-F

SAVE THIS STATEMENT OF YOUR EARNINGS AND PAYROLL DEDUCTIONS FOR PERIOD SHOWN BELOW.

GROSS EARNINGS	DEDUCTIONS							TOTAL	NET PAY	PER. END.	CHECK NO.
	S.U.I.	F.O.A.B.	W. TAX	GR. INS.	LIFE INS.	A/C REC.					
165.68	1.66	1.12	12.00					15.72	149.96		

HOWELL CHEVROLET CO.  
1000 S. BRAND BLVD. — GLENDALE 4, CALIF.

5 GC 17c

Admitted October 31, 1950.





(Testimony of Claude Leonard.)

Q. (By Mr. Nutter): Mr. Leonard, I now show you General Counsel's Exhibit 17-F. Tell us if you can describe that exhibit.

A. Well, there is no date on it; but that is the only one I could find with no date, and the rest of them all showed 1949. So this must be from 1950; you know, from January 1st to the 15th. We are paid every two weeks, the 1st and 15th.

Q. I see. Now, can you tell us what the date is that you received this?

A. I would say that this is from the 1st to the 15th.

Q. To the 15th of January?

A. January, 1950. [77]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 17-F for identification was received in evidence.)

[See Photo Page 136.]

Q. (By Mr. Nutter): Now, Mr. Leonard, I believe you previously testified that you were discharged on March 31? A. That is right.

Q. Can you tell us the time, place and circumstances? What happened on the date that you were discharged?

A. It was on Friday at about 6:00, Friday around 6:00 o'clock. I worked overtime that night on a job I had to get out; and I finished up the

(Testimony of Claude Leonard.)

job, turned in the ticket, and went in to change clothes.

Then Mr. Bordeau and the service manager Ed Anthony come in the dressing room and Mr. Bordeau told me that he was going to have to let me go that night. And I asked him what was the reason, and he said there wasn't enough work for one man to make a living, so he was going to combine the brakes and front end together.

So I says, "Well, I have had more seniority here than the front end man. I can also do the job."

And he said, "Well, that is the way it is to be," and there wasn't nothing he could do about it.

Trial Examiner Myers: And who is the front end man—at [78] that time?

The Witness: Kenny Herrick. Kenny had been there about two months.

Q. (By Mr. Nutter): Now, Mr. Leonard, I notice that on General Counsel's 17-A, 17-B, 17-C and 17-D your earnings appear to be less than they were prior to that date. Can you tell us what you were working on? You worked on brakes during that period? A. Yes, sir.

Q. Anything else during that period?

A. No; nothing at all, only brakes.

Q. Well then, did you just hang around? Tell us, when you finished a job working on brakes, what did you do?



(Testimony of Claude Leonard.)

A. Just waited for someone else to come in with a brake job.

Q. Well, you testified previously that you were assigned jobs by the service salesman; is that right?

A. Service salesman or service manager.

Q. And if you were not assigned jobs, is it correct that you did not work at all? A. No.

Q. Were you assigned any type of work by any supervisor in the plant?

A. Other than brake work?

Q. Yes. A. No. [79]

Trial Examiner Myers: Well, when you were not working, did you receive any compensation?

The Witness: No, sir.

Trial Examiner Myers: Your job was a straight commission?

The Witness: Straight commission.

Q. (By Mr. Nutter): I believe it is your testimony that you did no other work other than the brake work?

A. No, sir—not during this time here.

Q. During that period represented by General Counsel's 17-A through 17-F?

A. That is right.

Q. Did you work in a stall?

A. Yes, we had different stalls to work in. There was a brake department, and then the line and the front end department, tune-up stalls, and things like that.

(Testimony of Claude Leonard.)

Q. And I take it that at least while you worked there there was a stall assigned for brake work; is that correct?      A. Yes, sir.

Q. Was there brake work done at any other parts of the plant other than the stall where you worked?

A. There was some brake work done on the lube rack; that is, you know, anything pertaining to brakes I was supposed to get; and there was some of it done out on the lube rack, and there was some done on the tune up.

Q. And when was that work done? Will you tell us the time [80] and place?

A. A couple of the jobs that were done on the lube jobs that I happened to catch them being done out there was on March 23 and 24.

Q. Now, will you tell us the time and place and circumstances about them?

A. Well, they were adjusting brakes.

Q. Who was?      A. The lube men.

\* \* \*

Q. (By Mr. Nutter): Who were the men who worked in the lubrication department?

A. One of their names was Bordeau; that was Chub Bordeau's son. The other one we called him Tiny. I don't recall his last name.

Q. Whereabouts did those men work in relation to your brake stall?

(Testimony of Claude Leonard.)

Trial Examiner Myers: Where did they normally work?

The Witness: In the lubrication department; that is right [81] on the street shop, on the Brand side.

Trial Examiner Myers: And who were working on these two machines March 23 and 24?

The Witness: Well, when I was out there, Tiny was adjusting a set of brakes.

Q. (By Mr. Nutter): Tiny who?

A. I don't know his last name—Tiny, a lube man.

Q. You mean you were out in the lube department and you saw him?

A. Adjusting brakes.

Q. What date was that?

A. That was March—they were doing—there were two days there, March 23 and March 24.

Q. You mean this Tiny, this lube man, was doing it on both days?

A. The next day they were bleeding a set of brakes, you know, bleeding.

Trial Examiner Myers: Wait a minute. How many times did you see Tiny, the lube man, adjust brakes in the lube department? A. One day.

Q. What day was that? A. The 23rd.

Q. Of March? A. March, 1950. [82]

(Testimony of Claude Leonard.)

Q. Now, what date did you see somebody bleed the brakes?

A. They were bleeding the brakes——

Q. Well, wait, now. What date?

A. The 24th of March, 1950.

Q. And who were doing that?

A. They were both.

Q. Who were both?

A. The two lube men; one of them is Bordeau and the other one is Tiny.

Q. Now, will you try to remember to say names instead of pronouns like he, they and we?

A. Yes, sir.

Q. (By Mr. Nutter): Did your duties as brake man require that you bleed brakes?

A. When it was wrote on the order to bleed the system.

Q. I see; and what does that consist of? Will you tell us what that is?

A. Well, in the brake department we have a bleeder tank.

Q. What do you do when you bleed brakes? What process is involved?

A. Let the air out of the lines.

Trial Examiner Myers: Why do you bleed the brakes?

The Witness: If it gets air in the lines, you know, in a hydraulic system, you have a spongy pedal, and you have to bleed that air out to get it out of the lines. [83]



(Testimony of Claude Leonard.)

Trial Examiner Myers: In order to make the brakes effective?

The Witness: That is right.

Trial Examiner Myers: And when there is air in the hydraulic system, the brakes do not work effectively?

The Witness: That is right; they are not effective. They get a spongy pedal.

Q. (By Mr. Nutter): Now, what process do you go through when you adjust brakes?

A. We adjust each wheel; you adjust your shoe up to your drum, to the proper clearance.

Q. And just what do you do? Physically, what do you do?

A. Well, you take a brake-adjusting spoon which you use. It has got a little cog in there you have to turn to adjust the shoes, spread them out close to the drums.

Q. Now, on any other occasion did you see any men in the lubrication department adjusting or bleeding brakes?

A. Well, I didn't see them in the lubrication department. I saw——

Mr. Nicoson: Objected to as not being responsive. All he asked was about the lubrication department.

Trial Examiner Myers: Sustain the objection.

Q. (By Mr. Nutter): Can you first answer me as to the lubrication department?

(Testimony of Claude Leonard.)

A. I didn't see any work being done in the lubrication [84] department.

Trial Examiner Myers: Where did you see it——

The Witness: I——

Trial Examiner Myers: ——if you did?

The Witness: I saw Frank Hogan give him a brake adjust to do that they were doing body work on. And Bordeau told me that he was supposed to adjust them.

Trial Examiner Myers: Young Bordeau?

The Witness: Young Bordeau. And I said, "That belongs to the brake department." And he said he had orders to adjust the brakes. So I didn't adjust them; I suppose he did.

Mr. Nicoson: Move to strike what he supposed.

Trial Examiner Myers: Strike what he supposes.

Q. (By Mr. Nutter): Was there any other occasions when you saw anyone adjusting or bleeding brakes or working on the brakes?

A. Other than the lubrication department?

Q. Other than the ones you have testified to.

A. Yes, there were some——

Trial Examiner Myers: Well, when was this that the body man——

A. The date I don't know.

Q. What month?

A. It was in March.

Q. Of 1950? [85]

A. Yes.

Q. Now, you are going to tell us about another time? A. There were——

Q. When?

A. In February, the date I don't know.

Q. What part of February?

A. The tune-up department.

Q. What part of February?

A. Around the middle part of February.

Mr. Nutter: Is this 1950?

The Witness: 1950.

Trial Examiner Myers: And in what part of March was the other one that the body man was working on?

A. It was around—oh, around the last part of March, just before I was laid off.

Q. (By Mr. Nutter): Now, can you tell us about this occasion that you said happened in the middle of February of 1950?

A. That was the tune-up man doing work I should have done, replacing stoplights' switches and hydraulic system.

Q. Well, was it your regular duty to replace stoplight switches?

A. It is—because you got to open up your master cylinder to take the stoplight switch out and put a new one in.

(Testimony of Claude Leonard.)

Q. You mean the master brake cylinder? [86]

A. That is right—from '42 on up. That is the electrical system from '42 on back. But from '42 on up you got to open up your master cylinder to get into the hydraulic system.

Q. Was it also your duty to do the work on the hydraulic systems?

A. Sure—that pertains to brakes.

Q. Do you know the individual who was doing this work?           A. Doyle Christian.

Q. Whereabouts did Christian work?

A. In the tune-up department.

Q. Whereabouts is the tune-up department in relation to where you were?

A. Well, that is right as you come in the front door.

Trial Examiner Myers: Well, how far is it from your stall?

The Witness: Oh, 75 feet, approximately.

Trial Examiner Myers: On the same floor?

The Witness: Same floor.

Q. (By Mr. Nutter): Did you on any other occasion in 1950 see any work being done on brakes in any other departments of the plant?

A. Yes, the front end man done some brake work—Kenny.

Q. Kenny Herrick?           A. Herrick.



(Testimony of Claude Leonard.)

Q. And when was that and where was it? What took place?

A. Well, this was a master cylinder that I had overhauled on [87] a Chevrolet. I overhauled the master cylinder then bled the lines—and I still didn't have much pedal. I had about a half a pedal, but it was solid.

So I told Ed—that is the service salesman—that it needed the brake adjustment. He said, "No, it has been adjusted."

The guy told him it had been adjusted—the customer.

Q. When was this?

A. This was, oh, about the middle of March, I imagine. The dates I can't recall.

Trial Examiner Myers: You mean about the middle of March——

The Witness: Of 1950.

Q. (By Mr. Nutter): Now, can you go on and tell us what happened? A. So he——

Trial Examiner Myers: Who is "he"?

The Witness: Ed said no, that the customer told him that he just had the brakes adjusted.

Well, I couldn't go ahead and adjust them without authority. So the car went out; it come back in the second day with brake trouble.

So they give it to Kenny, the front end man, and told him to repair the master cylinder. So I was busy on a brake reline, but I knew he got the mas-

(Testimony of Claude Leonard.)

ter cylinder. So he tore it [88] down and asked me to come there and look at it.

Trial Examiner Myers: Who is "he"?

The Witness: Kenny. And he asked me to come out and look at it. I went out and said, "You are doing it. It is your job. It is up to you."

And he said, "I can't find a thing wrong with it."

So Kenny put the master cylinder back together, bled the lines, and he still had the same trouble I had. So I told him if he would adjust the brakes which I wanted to do to start with, the pedal would be all right.

So Kenny went and asked Ed; and Ed said no, it didn't need brake adjustment. So Kenny and I adjusted the brakes anyway until we had a solid pedal.

\* \* \*

Q. (By Mr. Nutter): Now, Mr. Leonard, were there any other occasions when you saw anyone else doing brake work in the months of February and March of 1950?

A. Not that I recall right now.

Trial Examiner Myers: Well, did you see anybody do any kind of work that you normally did, that you saw them do in February or March of 1950, work that you ordinarily were asked to [89] do?

The Witness: No. That is about all, I believe. There was sometimes when I would be too busy to

(Testimony of Claude Leonard.)

take a job and they would give it to somebody else—which is right. [90]

\* \* \*

Q. (By Mr. Nutter): Now, Mr. Leonard, after you were discharged did you at any time return to the Howell Chevrolet plant?

A. Yes, I was down there a couple of times after.

Q. Well, will you tell us about when you were down there?

A. Well, the one I remember most was——

Trial Examiner Myers: Was that the first time or the second time?

The Witness: That was the last time.

Trial Examiner Myers: How many times were you there?

The Witness: I was there about three times.

Q. (By Mr. Nutter): All right. Now, this last time, when was that?

A. The last time was on July—the date I don't recall. It was the day they had the election there.

Q. June 1, 1950?

A. I say I don't recall the date. [91]

Mr. Nutter: May it be stipulated that the election was held on June 1, 1950?

Trial Examiner Myers: What election?

Mr. Nutter: The election in Case 21-RC-1146.

(Testimony of Claude Leonard.)

Mr. Nicoson: We will stipulate that is the date.

Mr. Skagen: So stipulated.

Q. (By Mr. Nutter): Now, can you tell us what time you were down at the plant on that date?

A. It was around 11:30, I guess. That is as close as I could get.

Q. 11:30 in the morning?

A. In the morning.

Q. And whom did you see down there?

A. Well, I saw some of the boys I used to work with.

Q. Did you see anybody else?

A. I was talking to George Kirkland, and then he went away, and I was down there by the job he was working on.

Mr. Howell came up to me. I didn't know there was anybody close to me. He came up by the side of me and I looked around and saw who it was. He asked me what I was doing there, and I said, "I come down to see the boys." And he said that unless I had some good business there, "You will have to get out."

And I said, "I didn't know you felt that way about it." And he said, "I sure do." [92]

So I had to get out.

Q. Is that all there was to it?

A. That is all he said.

\* \* \*



(Testimony of Claude Leonard.)

Cross-Examination

By Mr. Nicoson: [93]

\* \* \*

Q. And then you came back to Mr. Howell, that is, the second time, and you came back strictly as a brakeman? A. That is right.

Q. That was the understanding when you came back to work that you would be a brakeman and that you would not be called upon to do any line work?

A. No, I didn't say I wouldn't be called upon to do anything—because he hired me, because I was an all-around mechanic to do anything.

Q. I see. But you were not hired as an all-around mechanic, [104] were you?

A. No, I was hired as a brakeman.

Q. You were hired only as a brakeman; is that correct? A. That is right.

Q. And you understood at the time you were hired as a brakeman that that is the type of work that you were to do; right? A. Yes.

Q. You understood that you were to perform any work on the line as a mechanic; is that correct?

A. Well now, I wouldn't say that—because when I wasn't busy and they were busy on the line, the service manager would give me work of that kind.

Q. Did the service manager say that at the time he put you on as a brakeman? A. No.

(Testimony of Claude Leonard.)

Q. He did not say that?

A. No, there was nothing said about that.

Q. All right; if you will just stay with me a minute, we will be all right. When you got hired the second time it was exclusively as a [105] brakeman?

\* \* \*

The Witness: He said he put me on brakes because—if I wasn't busy on brakes that he could always swing something else to me.

Q. (By Mr. Nicolson): All right. Now, it is your testimony that when you were not busy on brakes, he did swing other things?

A. He did.

Q. When you did not have a brake job or work of that type, then he would put you on the line; right? A. Yes.

Q. Or some other task?

A. Something——

Q. Some other task to fill in your time?

A. Yes.

Q. That is correct? A. Yes.

Q. So that he did fill up the blank time on the brake job, where he could, with other types of mechanical work which he thought you were qualified to do; right? A. That is right.

Q. Now, how many times would you say you worked on front ends while you were out there?

Trial Examiner Myers: You are referring to the second time?

(Testimony of Claude Leonard.)

Mr. Nicoson: Second time, yes. [106]

The Witness: Well, I had that and the brakes.

Q. (By Mr. Nicoson): No, let us confine ourselves if you will to front ends. How many times did you work on front ends during the time you were out there the second time?

A. That is hard to say because I was on it two weeks while the man was on his vacation. You just don't exactly keep tabs on the jobs you do.

Q. You know then of two weeks while the man was on his vacation that you took care of front-end work? A. That is right.

Q. And that was in 1949 or 1950? A. '49.

Q. '49? All right.

Trial Examiner Myers: Well, when did you go back? 1949?

The Witness: '48.

Trial Examiner Myers: You were working there from when in 1948?

The Witness: February of 1948 till March of 1950.

Trial Examiner Myers: Is it over two years?

The Witness: That is right.

Q. (By Mr. Nicoson): All right. Now, when were other occasions when you worked on front ends?

A. Well, the front-end man was off quite a bit and when he was off I would be asked to do front-end work.

(Testimony of Claude Leonard.)

Q. And what type of front-end work did you do? [107]      A. All kinds.

Q. All right. Name some of them.

A. Kingpins and bushings.

Q. Kingpins? What is that?

A. That is your kingpins that holds your spindles to the axles.

Trial Examiner Myers: Well, do they have another name for it?

The Witness: Kingpins and bushings—that is the right name.

Q. (By Mr. Nicoson): And what would you do with the kingpins?

A. Replace them if they were worn.

Q. Was that the only thing—

Trial Examiner Myers: Well, that had to do with the alignment, did it not?

The Witness: Your kingpins are your pins that hold your car.

Trial Examiner Myers: That is with the alignment of the wheels?

The Witness: That is right.

Q. (By Mr. Nicoson): What would happen if the kingpins were worn?

A. You would have a shimmied front end.

Q. That is what causes the wheels to shimmy? Is that correct?

A. Well, other things could cause them to shimmy, too. [108]

Q. But that would cause it, too, would it not?



(Testimony of Claude Leonard.)

A. Yes, sir.

Q. Would it cause the wheels to run crooked and out of line?      A. Out of line.

Q. And cause tire wear, et cetera?

A. Tire wear.

Q. The only way to repair that is to take the kingpins out and put new ones in?

A. That is right, kingpins and bushings.

Q. How many times did you do that?

A. I don't usually keep tab of the jobs I do.

Q. Do you have any idea?      A. No idea.

Q. You do not know whether it was one or a million?      A. It was more than one.

Q. Well, that could be two. Could it be more than two?      A. More than two.

Q. What is your present recollection of it?

Trial Examiner Myers: Approximately?

The Witness: In the two weeks you would probably have three to four sets of kingpins to put in; maybe the same number of upper and lower pivot pins.

Q. (By Mr. Nicoson): Is that your recollection of the number that you put in?

A. Well, the four—they usually run that much in two weeks. [109]

Q. That is not your testimony that you put in three or four kingpins every week, is it?

A. I was working there——

Trial Examiner Myers: He is talking about the two weeks that he worked there——

(Testimony of Claude Leonard.)

Mr. Nicoson: I understand that.

Trial Examiner Myers: —while somebody was away.

Mr. Nicoson: I just wanted the record to show that it was not his testimony that he put in three or four kingpins every two-week period.

Q. (By Mr. Nicoson): Well, is it your recollection that the three or four kingpins that you put in were put in during this period that the front-end man was on his two-weeks' vacation?

A. That is the most at one time that I handled—that was during the two weeks. Maybe the other time would only be one day, maybe two days; every time he would be off I would be assigned to take care of the front-end work, which sometimes wouldn't even have a job out there.

Q. So that when the brake work was done, why, they would fill in your idle time with front-end work?

A. No, I had to take care of the brake work, too.

Q. Well, you could not do front-end work and brake work at the same time.

A. There is a lot of places the front-end man does the front end and brake work. [110]

Q. Well, would you mind answering the question? Could you do those two jobs at one and the same time?

A. Well, sure, you could handle brakes with the front end.

Q. You mean you could put in the kingpins and adjust the brakes at the same time?

(Testimony of Claude Leonard.)

Mr. Nutter: Mr. Examiner, I think that——

Trial Examiner Myers: Well, he does not mean at the same moment.

Mr. Nicoson: I do not know what he means.

Mr. Nutter: Mr. Examiner——

Trial Examiner Myers: Wait a minute now.

Trial Examiner Myers: When a car comes in to have something done with the brakes and also something done with the front end, is it normally assigned to one man?

A. If they have a brakeman——

Q. All right. Now, you take Howell's. He has a brakeman and a front-end man. A. Yes.

Q. If a car came in and needed the front end fixed or inspected, and the brakes fixed or inspected, would that car be assigned to one man?

A. If it had a brake job it would be assigned to a brake job; if a front-end job, it would be assigned to the front-end man.

Q. Well, if a car has two jobs to be done on it, front end and brakes—— [111]

A. Well, it would be assigned to two different departments.

Q. That is what he wants to know. So when they needed front end and brakes and they did not have a front-end man, you would take care of both jobs?

A. Yes, if they needed it.

Q. All right. Which one would you do first?

A. If they had a front end and brakes?

Q. It did have it. My car was busted and needed the front end and the brakes fixed.



(Testimony of Claude Leonard.)

A. Well, you do them then in conjunction, because you have to pull your wheels and then do both jobs.

Q. (By Mr. Nicoson): You say you have to pull your wheels to do a brake job?

A. Well, I wouldn't know how else to do them.

Q. All right; and what do you have to do to do a kingpin job?

A. You have to pull your wheels.

Q. Is the amount of pulling your wheels more on a kingpin job than it is on a brake job, or is it the same?      A. What do you mean?

Mr. Nutter: I submit that the question is unintelligible.

Q. (By Mr. Nicoson): Do you take off more of the wheel to do the brake job or the front-end job?

Mr. Nutter: I submit the question is still unintelligible. I do not know what "more of the wheel" is.

Trial Examiner Myers: Well, maybe if you just listen. [112]

Mr. Nicoson: I do not know about automobile repairing; I am trying to find out.

Trial Examiner Myers: I cannot say whether "more" is unintelligible, because I do not know enough about automobile mechanics. I will overrule the objection.

The Witness: You have to pull your wheel and drum to get to either one.

Q. (By Mr. Nicoson): You do not have to take off the drum for a brake adjustment?



(Testimony of Claude Leonard.)

A. Not a brake adjustment.

Q. You do not even have to take the wheel off for a brake adjustment?

A. Not a brake adjustment.

Q. But you do have to take it off for a kingpin job?

A. You have to take it off for a brake-relining job.

Q. But you do have to take the drum off for a kingpin job?

A. For a kingpin job, and for a brake relining job.

Q. Now, in this front-end job at Howell's, would you describe the stall in which the front-end work was done? Was there one or was there two stalls?

A. Two stalls: One where you usually tear them down, the front-end man tears them down and puts in the kingpins, pivot pins, and whatever is to be done; and then when he reassembles it, why, he pulls it up on the front-end machine and lines it up. [113]

Q. All right. Now, when you speak of front-end work you confine that job solely to the type of work that you have been describing here as front end; is that all of that job at Howell's?

A. Front-end work.

Q. The front-end man is confined only to the type of front-end work that you have been telling us about?

A. He was when I worked there.

(Testimony of Claude Leonard.)

Q. Is it not a fact that this particular front-end man also was required to straighten frames?

A. That is right.

Q. And they have at Mr. Howell's a frame-straightening machine, for want of a better word; is that correct?      A. Yes.

Q. And is it not also a fact that you never worked on that machine during the entire time you worked at Howell's?

A. They never had a frame to be straightened.

\* \* \*

Q. Did you work on straightening frames at any time?      A. No.

Q. Had you ever worked on straightening frames?      A. No.

Q. You had no experience on working with that machine out there that straightens the [114] frames?      A. No frame machine. [115]

\* \* \*

GEORGE A. KIRKLAND

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Nutter:

Q. Mr. Kirkland, what is your occupation?

A. Mechanic, automobile mechanic. [123]

\* \* \*

Q. And you are employed by some one, are you?

A. No, it is my own business.

Q. And have you worked at the Respondent Howell Chevrolet Company? A. Yes.

Q. And will you tell us when that was?

A. I worked from October, 1945, to September in 1950.

\* \* \*

Q. (By Mr. Nutter): Mr. Kirkland, I show you this card and ask if you can identify that. Is that your signature?

A. Yes, that is an authorization card I signed.

Q. Can you tell us when you signed it?

A. 1/28.

Q. You mean January 28 in what year?

A. 1950. [124]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 18 for identification was received in evidence.)

(Testimony of George A. Kirkland.)

**GENERAL COUNSEL'S EXHIBIT No. 18**

**Authorization for Representation under the  
National Labor Relations Act**

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No. . . . . , Clock  
No. . . . . , Shift No. . . . . , Plant No. . . . .

Home Address—St.: 202 Lamour Dr.

City: La Canada.

Tel. No.: . . . . .

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power  
or authority heretofore given to any person or  
organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 28, 1950.

/s/ GEORGE A. KIRKLAND.

(Signature of Employee.)

GEORGE A. KIRKLAND.

(Please Print Name.)

Admitted November 1, 1950.



(Testimony of George A. Kirkland.)

Q. (By Mr. Nutter): Now, Mr. Kirkland, do you know a man by the name of Frank Ogen?

A. I do.

Q. Who is Mr. Ogen?

A. When I worked at Howell Chevrolet in the latter part of my tenure there he was the body shop foreman.

Q. Did you have any conversations with Mr. Ogen concerning the union while you were employed at Howell Chevrolet? A. Yes.

Q. Can you tell us when that was?

A. Oh, that was around the first week in February.

Q. What year? A. 1950.

Q. And where was this conversation? [125]

A. Oh, it took place in the parking lot just outside of Mr. Ogen's office.

Q. And who was present?

A. Mr. Ogen, Claude Leonard and myself.

Q. And what time of day was it?

A. It was in the afternoon, is all I can say.

Q. Now, will you tell us what was said at this conversation?

A. Well, I will have to go back a little bit to explain it.

Mr. Nicoson: I object to him going back. He may answer the questions as put to him.

The Witness: We asked Mr. Ogen——

Trial Examiner Myers: Overruled. You may go ahead. Now don't say "we." We want to know who.

(Testimony of George A. Kirkland.)

The Witness: Oh. Claude Leonard and myself went up to talk to Mr. Ogen.

Trial Examiner Myers: When—this afternoon?

The Witness: That afternoon. And we asked Mr. Ogen where he got his information that all the employees that joined the union were going to be fired.

He said he got it from Mr. Howell the evening before.

Q. (By Mr. Nutter): Was there anything more to the conversation?

A. No, that was all of it. [126]

\* \* \*

Q. Now, what were your duties at Howell?

A. Line mechanic.

Q. And whereabouts did you work as a line mechanic?

A. I worked in the back shop between—well, there are four stalls in and across there.

Q. Four stalls?

A. And I worked in the second one from one end.

Q. And who had the other stalls?

A. On one side of me was Lee Fitzhugh; on the other side was Joe Price. On the other side of Joe Price was Claude Leonard.

Q. While you were working in your stall could you see individuals who were working in the stall that Claude Leonard worked in? A. Yes.

Q. Now, do you recollect how long Claude Leonard worked at Howell? Did he work there all the time you worked there?

(Testimony of George A. Kirkland.)

A. No; about two years of that time.

Q. And do you recall about when he left the employment there?

A. I believe it was the latter part of March.

Q. And after Claude Leonard left employment at Howell did you see any individual working in his stall—brake stall?

A. Yes, for a few days until they moved the brake stall outside. [127]

Q. Yes. And who did you see there?

A. The man that took over the brake work, Kenny Herrick, would come in there and do the work that was necessary to be done on the equipment that was inside.

Q. Now, before Claude Leonard left his employment at Howell Chevrolet, during the months of February and March, 1950, did you see anyone else doing brake work there?      A. Yes.

Q. And when and where and who did you see?

A. Well, all during that time the brake adjustments were taken out to the lube rack.

Q. And did you see whom working on the brake adjustments on the lube rack?

A. Fred Bordeau and Tiny Reeves.

Q. And when was this that you saw this brake work done at the lube rack?

A. It was during February and March.

Q. 1950?      A. 1950. [128]

\* \* \*

Q. Now, did you see anybody adjusting brakes

(Testimony of George A. Kirkland.)

out on the lube rack? How many times did you see individuals adjusting brakes out on the lube rack at Howell Chevrolet?

A. I checked on it four or five times.

Q. Four or five times? A. Yes.

Trial Examiner Myers: During what period?

The Witness: During that period between February and March.

Trial Examiner Myers: 1950?

The Witness: 1950.

Q. (By Mr. Nutter): And you checked on it and you saw someone doing brake adjustments?

A. Yes. [129]

Trial Examiner Myers: Who did you see doing it?

The Witness: Fred Bordeau and Tiny Reeve, the lubrication man.

Q. (By Mr. Nutter): Did you see anyone else doing brake work during the months of February and March, 1950?

A. Well, the tune-up man put on stop-light switches.

Q. Who was the tune-up man?

A. Doyle Christian.

Q. And when was that—where?

A. That was during that same period. I don't recall any specific time.

Q. Do you remember on how many occasions you saw the tune-up man put on stop-light switches?

A. Only twice that I can say definitely.

Mr. Nutter: I see.



(Testimony of George A. Kirkland.)

Trial Examiner Myers: That is during the period of what?

The Witness: During that period February and March, 1950.

Q. (By Mr. Nutter): Now, during the time that you were employed at Howell Chevrolet did you hear any speeches made by Mr. Potruch, the counsel here? A. I did.

Q. Now, can you tell us when that was?

A. As near as I can recall it was the middle or the latter part of April. [130]

Q. 1950? A. 1950.

Q. Now, can you tell us what occasion this was and who was present?

A. Well, one morning—that was just before noon, I believe. Mr. Bordeau came around and told us to gather over in this specified spot in the shop, that “we are going to have a little meeting.”

So all the employees gathered over there and Mr. Howell introduced Mr. Potruch as the company lawyer. He said we were having a little labor difficulty and Mr. Potruch was going to explain the company's policy.

Q. Now, will you tell us what Mr. Potruch said at this meeting.

A. Mr. Potruch said Howell Chevrolet was a small company and he did not think we needed a union; if we had any problems we could go to Mr. Howell and he would straighten them out for us.

He also said that we would never get a union

(Testimony of George A. Kirkland.)

contract at Howell Chevrolet; that we would have to strike, and that it would be a long strike as they would take it to the courts and fight it clear up to the Supreme Court. They would fight it because they didn't like a group of men in Washington telling them how to run their business. He also said he would fight it to Mr. Howell's last [131] dollar.

Q. Was there anything else said by Mr. Potruch at this meeting?

A. He said if Mr. Howell didn't take care of our problems we should take a rope and take him out and hang him.

Q. Anything else said?

A. I can't recall. [132]

Q. Was there anything else said that you recall?

A. Oh, he took out a little book and read a passage out of it pertaining to the labor law and said that that showed that Howell Chevrolet Company could sue to show that they were not in interstate commerce.

Mr. Nutter: That's all.

\* \* \*

### Cross-Examination

By Mr. Nicoson:

Q. You were there at the time Mr. Leonard left, were you not?      A. Yes.

Q. And after he left the only person who worked in his stall was Mr. Herrick, wasn't it?

A. In the stall where he was, yes.

(Testimony of George A. Kirkland.)

Q. And then after that they moved some of the equipment outside near the frame straightening rack? A. Yes. [133]

Q. And after that time Mr. Herrick worked there, too? A. Yes.

Q. And the stall where Mr. Leonard had been working was reconverted to a line mechanic, wasn't it? A. Yes.

Q. And then the brake work and front-end work was all done by Mr. Herrick outside in this new place where they moved the equipment?

A. Yes.

Q. And he was the only one that worked at that place, wasn't he?

A. When he would get busy he would have a man come in and help him.

Q. He brought a man in from outside, didn't he?

A. I don't know. It was a new man there. He just came in at those times.

Q. He was only there a few days?

A. Yes. He would come off and on.

Q. A day at a time? A. Yes.

Q. Probably one day a month?

A. No, I think it was more than that. I would say about six or eight times.

Q. But you didn't make any particular check as to how often he came in or who paid him, or anything about it? [134] A. No.

Q. Now, you stated something about discovering brake work being done on the lube rack. Didn't



(Testimony of George A. Kirkland.)

you know that brake work had been done on the lube rack all the time that you were out there—long before you came?

A. It had been done out there when the brake man was busy and couldn't take care of it.

Q. As a matter of fact, it had been the practice of the company to do these minor brake jobs on the lube rack because it was convenient?

A. When the brake man was busy.

Q. You say you know about brakes?

A. Yes.

Q. And the adjustment is not a terrifically complicated thing, is it?      A. No.

Q. It consists something of taking a wrench or a tool and tightening a set-screw, or some arrangement like that, which expands the shoes?

A. Yes.

Q. And it is quite a simple matter to do that while the car is on the lube hoist and it is easy to get to, isn't it?      A. That is right.

Q. And ordinarily that wouldn't take very long, would it, four or five minutes at the most? [135]

A. Well, you have to check the fluid. It takes a little longer than that.

Q. Well, if you are just adjusting the brakes without checking the fluid. Of course you would have to bring it down to check the fluid. You can't do that while it is up in the air. So that the mechanical time actually devoted to the setting of these set-screws is three or four or five minutes, is very short?      A. About ten minutes, yes, sir.



(Testimony of George A. Kirkland.)

Q. Now, isn't it also a fact that the tune-up man had been working on stop-light switches for a long, long time?

A. He had been working on the later type stop-light switches, which are electric. The earlier type are hydraulic. Those are the ones we were speaking of.

Q. And the electric stop-light switches have been part of the tune-up job as long as you have known about the electric stop-light switches?

A. That is right.

Q. Now, just take the speech of Mr. Potruch. Mr. Potruch didn't tell you that anybody would be fired if they joined the union, did he? A. No.

Q. He didn't say — he didn't give you any promises of any benefits or anything like that if you voted against the union, did he? [136]

A. No.

Q. He told you that the Howell Chevrolet Company thought that the Howell Chevrolet Company was not engaged in commerce, in interstate commerce. Isn't that right? A. Yes.

\* \* \*

Q. And he also told you that because of that thought or conviction he was of the opinion that the matter should be tested in court. Isn't that correct? A. He said it should be tested in court.

Q. And he outlined to you the only steps available to the company to get that into court for review? A. Yes.

(Testimony of George A. Kirkland.)

Q. And he told you that if he did not succeed in the first review that it may be necessary to go to the Supreme Court of the United States?

A. Yes.

Q. Now he also told you that in order to get that case to the court, under the rules of the Board and the law, it would be necessary for the company to take a position of refusing to bargain in order to test the Board's finding, didn't he, or something to that effect? [137] A. Yes.

Q. And that was the only available way that the company had to get the matter into court for test on the jurisdiction question? He said that, didn't he? A. Yes. [138]

\* \* \*

Q. And he told you that the company couldn't make any changes at that time with the Labor Board case pending, because they would probably be charged with unfair labor practice if they did; isn't that right? A. No.

Q. What did he say about that?

A. He said they couldn't make any labor changes unless they asked the union.

\* \* \*

Q. Well now, specifically he said that with this Labor Board case pending the company couldn't raise any wages, didn't he?

A. Without asking the union.

Q. Without asking the union. He also said that

(Testimony of George A. Kirkland.)

they couldn't make any changes in working conditions?      A. That is right. [140]

\* \* \*

Q. Mr. Potruch told you and the rest of the employees there that it was your right to join the union if you wanted to?      A. Yes.

\* \* \*

Q. Well, he did tell you that the employer had nothing to say about whether you joined the union or not?      A. Yes.

Q. Any more than the employer could say that you could join the Elks, Masons or any other fraternity. He said that, didn't he?

Trial Examiner Myers: Answer, will you, please?

The Witness: Yes.

Q. (By Mr. Nicoson): Now, he also expressed a personal opinion to you about the need of the union, didn't he?      A. Yes.

Q. And he told you that in his judgment the way the thing should be handled was that if you had a beef with the employer [141] that you ought to give the employer a chance first, isn't that right?

A. Yes.

Q. And then if the employer didn't make the adjustment to your satisfaction, you ought to try to hang him?      A. Yes.

\* \* \*

Q. Now, this second time he spoke to you, you say was a little group inside Mr. Bordeau's office?

A. Yes. [142]

(Testimony of George A. Kirkland.)

Q. And at that meeting he explained to you the ballot? A. Yes.

Q. He had a sample ballot in his hand and he held it up for you to look at? A. Yes, sir.

Q. And he told you that there were two methods of marking the ballot? A. Yes.

Q. If you wanted to vote for the union you would put your X in this square where it said for the unions? A. Yes.

Q. And if you wanted to vote against the union you would put your X over in the square where it says "No Union"? A. Yes.

Q. And he also told you that this election would be held by an agent of the government from the National Labor Relations Board? A. Yes.

Q. And that this agent would come out and he would be the one that would conduct the election, right? A. Yes.

Q. That the agent would be the only one to handle the ballot except you and the other voters? A. Yes.

Q. That the agent would hand you a ballot; that you would [143] go in a secret booth and would secretly mark it and you would yourself personally put it in a ballot box? A. Yes.

Q. And that no one would ever know, unless you told them, how that ballot was marked, isn't that right? He told you all of that?

A. That is right.

Q. And that is the way it happened, wasn't it?

A. That is right.



(Testimony of George A. Kirkland.)

Q. Was anything said by Mr. Potruch that caused you to mark your ballot in any particular way?

Mr. Nutter: Mr. Examiner, I object to this question.

Trial Examiner Myers: I will sustain the objection.

Mr. Nicoson: Your Honor, I don't like to argue these things with you, but he makes an objection without giving any grounds, and you make a ruling without giving any grounds. I——

Trial Examiner Myers: There are several court decisions on that question.

Mr. Nicoson: That may be so, but the record still doesn't show the basis of the objection or the basis of the ruling. [144]

\* \* \*

### Redirect Examination

By Mr. Nutter:

Q. Mr. Kirkland, you testified on cross-examination that it was the practice to do brake jobs—that it was the practice of the lube man to do brake jobs when the brake man was busy. On these occasions that you testified that the lube man did brake jobs—I mean in February and March—did you see Mr. Leonard working? A. No.

Q. Was he working? A. No, he was not.

\* \* \*

Q. (By Mr. Nutter): You testified on cross-examination, according to my notes, that Mr. Potruch said that there would be no changes in

(Testimony of George A. Kirkland.)

working conditions unless the company asked the union. Did Mr. Potruch make a statement after that? [145]

A. Yes. He said, "And by God, we won't do that."

\* \* \*

Q. (By Mr. Skagen): Mr. Kirkland, on cross-examination you testified that it was a simple matter to adjust brakes. Would you explain what you mean by that?

A. Well, it is a simple matter to get the tool up there and wiggle it in the hole to adjust the brakes.

Q. Would it be a simple matter for a person who didn't know anything about adjusting brakes?

A. Well, I have seen some come in from the lube rack that were improperly adjusted. [146]

\* \* \*

#### Recross-Examination

By Mr. Nicoson:

Q. On this brake adjustment, Mr. Kirkland, the usual practice is to take this wrench or tool and bring it up just as tight as you can get it until the wheel is practically locked and then ease off the adjustment until the wheel turns fairly easily; isn't that correct? A. Yes.

Q. And that is the process? A. Yes.

Q. And that is all there is to it? Isn't that right? A. Yes, sir. [147]

\* \* \*

(Testimony of George A. Kirkland.)

Q. Don't you also know that at Howell Chevrolet that the lube men do other types of minor mechanical work like putting on mufflers and tail pipes, and so forth?

A. They did after Mr. Bordeau came there.

Q. That is right. And their mechanical work isn't confined simply to making these minor brake adjustments. They do other types of mechanical work on the lube rack merely because it is convenient to do it while the car is in the air? [148]

\* \* \*

### LEE E. FITZHUGH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Nutter:

Q. Mr. Fitzhugh, what is your business?

A. Normally a mechanic—line mechanic.

Q. And what is your business now?

A. I have a service station and a garage and work of my own.

Q. That is in Sacramento, is it?

A. The other side of Sacramento.

Q. Were you formerly employed at Howell Chevrolet? A. That is right.

Q. And when was that?

(Testimony of Lee E. Fitzhugh.)

A. Oh, I began there in January of 1946—January 1, 1946—and was employed there until September the 9th of 1950. [149]

Q. Mr. Fitzhugh, what were your duties at Howell Chevrolet? A. I was a line mechanic.

Q. And whereabouts did you work at the plant?

A. I worked in the first stall on the right in back, after you got in the back shop.

Q. I believe you heard Mr. Kirkland's testimony about the line-up of mechanics? A. Yes.

Q. Is that the way it was when you worked there? A. Yes, sir.

Q. Now, did you work at Howell Chevrolet when Claude Leonard worked there?

A. Yes, sir.

Q. And did you see Claude Leonard working in his stall? A. Yes, sir.

Q. What kind of work did he do there?

A. He did brake work.

Q. Now, while you were working at Howell Chevrolet, during the months of February and March of 1950, did you see Claude Leonard doing brake work?

A. Yes. He did brake work then.

Q. Pardon?

A. Yes. He did brake work then.

Q. Did you see anyone else at Howell Chevrolet doing brake work during the months of February and March, 1950? [150]

A. Well, at times I would go out on the lube



(Testimony of Lee E. Fitzhugh.)

rack after oil, and I would see them adjusting brakes out on the lube rack.

Q. Who was that?

A. That was Tiny Reeve.

Q. Tiny Reeve? A. Yes.

Q. Now, when was this, can you tell us?

A. Well, it was somewhere in the—oh, February or March, somewhere in there.

Q. On how many occasions did you see Tiny Reeve adjusting brakes out on the lube rack?

A. I don't know exactly how many occasions. I never kept track of it or anything like that. I just happened to notice him adjusting brakes when I went out there.

Q. Can you give us an approximation? Approximately how many times you saw him.

A. Maybe two or three times.

Q. And do you know exactly what he was doing when you saw him?

A. I knew he was adjusting brakes. [151]

\* \* \*

Q. Now, were you present at the plant when a speech was made by Mr. Potruch? A. Yes.

Q. And when was that?

A. That was in, I believe, the latter part of April.

Trial Examiner Myers: You mean about the latter part of April?

The Witness: About the latter part of April, yes, sir.

(Testimony of Lee E. Fitzhugh.)

Q. (By Mr. Nutter): Now, will you tell us about that speech, who was present, when it was called, and what was said?

A. Well, Mr. Bordeau, he called us and he said there was going to be a meeting and for us to meet in a certain place in the shop, that there would be a short meeting there of about ten minutes, or something to that effect. And so we all gathered there and Mr. Howell and Mr. Potruch came out, and Mr. Howell introduced Mr. Potruch as his attorney. He turned the meeting over to Mr. Potruch then.

Q. I see. And would you tell us what Mr. Potruch said at the meeting?

A. Well, Mr. Potruch, he said that he would try to explain [152] the company policy; they was having some labor difficulty and confusion of some kind. You know, labor difficulties of some kind, and that he didn't feel as though the union had any place in there; that he felt the employees should go to Mr. Howell and discuss it with Mr. Howell; that he felt he was capable of handling his own employees.

Q. What else did he say?

A. And he also stated that the union wouldn't get any contract with Mr. Howell. That if we would go on a strike we would be out on a strike for a long time. He also said that he would fight the case as long as Mr. Howell had the money to fight it with. I think he stated in there, "To his last dollar."

(Testimony of Lee E. Fitzhugh.)

Q. Anything else said by Mr. Potruch?

A. Well, he also said that he would carry it to a higher court, but what court I don't remember. He just said a higher court. [153]

\* \* \*

### Cross-Examination

By Mr. Nicoson:

Q. Mr. Fitzhugh, when you left the employ of the Howell Chevrolet Company in September, I believe you said, you left there of your own accord because of some family difficulties?

A. Yes, sir.

Q. And you had an understanding with Mr. Bordeau that if you came back to California and you wanted to work for Howell and [154] and he had a job vacancy you could have it, is that right?

A. That is right, sir.

Q. Now, you were one of the employees that wore a union button around the shop, weren't you?

A. Yes, sir.

Q. Did Mr. Bordeau ever speak to you about wearing that button? A. No.

Q. Did Mr. Howell ever speak to you about wearing that button? A. No, sir.

Q. Did Mr. Bordeau say anything to you about the fact that you had worn a button?

A. No, sir.

Q. Did Mr. Bordeau or Mr. Howell tell you how to vote in the election? A. No, sir.

Q. Did they try to? A. No, sir.

(Testimony of Lee E. Fitzhugh.)

Q. Did they try to say anything to you about how you should vote or not vote? A. No, sir.

Q. After Mr. Leonard left, Mr. Herrick was given that work, wasn't he?

A. Yes, sir. [155]

Q. And the stall in which Mr. Leonard had been working, the machinery was moved outside next to the frame-straightening rack? A. Yes, sir.

Q. And that stall was thereafter utilized for a line mechanic? A. Yes, sir.

Q. After that change was there anybody who worked on that job outside beside Mr. Herrick?

A. Part of the time he would have another man come in and help him.

Q. On occasional days?

A. On occasional days, yes, sir.

Q. Now, do you know how often he had this man come in there?

A. No, I don't know how often.

Q. Who operated that frame-straightening machine?

A. Kenny Herrick, I presume he operated it.

Q. Who?

A. Kenny Herrick. Now, this fellow that came in and helped him, he would also work on the frame machine, too.

Q. (By Mr. Nicoson): Now, did you ever see Mr. Leonard do any work on the frame machine?

A. No, sir.

Q. Have you ever done any work on those frame machines? [156] A. No, sir.



(Testimony of Lee E. Fitzhugh.)

Q. You have seen them, though?

A. Yes, sir.

Q. Are they somewhat complicated in their operation?

A. I don't know whether they are complicated or not. It looks like a lot of heavy work there.

\* \* \*

Q. Mr. Potruch said to you that the company had no hand in bringing the union into the shop, or words to that effect, [157] didn't he?

A. I can't remember for sure whether he said that or not. He could have said it, but I don't remember.

\* \* \*

Q. And he also said at that time that the company couldn't give any raises because to do so would be to commit an unfair labor practice, didn't he?

A. Well, he said that they couldn't do that unless they asked the union to do so.

Q. All right. But he did say it?

A. He did say it, yes, sir.

Q. And he also told you that he couldn't make any changes in the working conditions for the same reason?

A. That is right, sir.

Q. And the reason was that the union had then pending this Labor Board case and that it, the company, didn't want to commit any unfair labor practice. He said that, didn't he? [158]

A. I believe he did say that, sir.

\* \* \*

(Testimony of Lee E. Fitzhugh.)

Q. And he said that because they bought the cars in California and sold the cars in California?

A. Yes, he said something about that.

Q. And he also said that he had some doubts about the applicability of the National Labor Relations Act to the Howell Chevrolet Company for that reason, didn't he?           A. I believe so, sir.

Q. And he said that they had raised that point before the Board in the hearing, didn't he?

A. Yes, sir. [159]

\* \* \*

Q. Now, in connection with this question of jurisdiction he discussed with you the methods that the company could take in order to test the question of jurisdiction over the Howell Chevrolet Company, didn't he?

A. I don't remember, sir, whether he stated that or not.

Q. Do you remember him saying anything about an appeal to the court?

A. Yes. He said something about an appeal to the court.

Q. That is right. And he told you that this particular case, because of the question of jurisdiction, would probably be tested in court. Isn't that right?

A. I don't remember him saying that, sir.

Q. Don't you remember him saying that the way that they would get the question to the test of the court would be—and the only way—that the com-

(Testimony of Lee E. Fitzhugh.)

pany would have to refuse to bargain? That way they could get themselves before the court for the review of the question of jurisdiction? [160]

A. I believe he said something to that effect, sir.

Q. He said that. All right.

Mr. Potruch did say that he didn't feel that there was anything between the company and the employees that couldn't be handled without government intervention, didn't he? A. Yes, sir.

Q. Now, he also told you in connection with this court procedure that if the union won the election the company could abide by that or else take it and contest it in court, didn't he? A. Yes, sir.

Q. He said he couldn't fire anybody because of the pendency of this case, didn't he?

A. Yes, sir.

Q. And he said that nobody would be fired because of it, didn't he?

A. I don't remember whether he made that statement or not. He might have. I don't remember.

Q. Do you remember he said if he did fire anybody the union would file unfair labor practice charges? You remember that, don't you?

A. Yes, sir.

Q. That is right. He told you you had a right to join the union if you wanted to, and it was none of the employer's business? [161]

A. Yes, sir.

Q. And an employer had no more right to tell you not to join the union than he had no right to

(Testimony of Lee E. Fitzhugh.)

tell you not to join the Elks or the Masons or any fraternity you liked to join?           A. Yes, sir.

\* \* \*

Q. Do you remember him telling you that there was a type of strike where the union would call a strike in order to compel the employer to sign a contract? Do you remember him saying something like that?

A. I don't remember. It seems he said something about strikes, but I don't remember just exactly what he said.

Q. Do you remember that he told you that in a certain type of strike the employees could be replaced by the company without the requirement of taking the strikers back? Do you remember him saying something about that? [162]

A. I don't think—I don't know, sir. But he stated Howell Chevrolet wouldn't hire them back.

Q. If they went out on an economic strike, is that the way he put it?

A. He might have called it an economic strike. I don't remember.

Q. Now, you are sure that he said they wouldn't hire them back?           A. Yes, sir.

Q. He also said that there were certain types of strikes which would be caused by unfair labor practices. Do you remember that?

A. I don't remember exactly his words or what he did state about that.

Q. And he said in that type of a strike that the



(Testimony of Lee E. Fitzhugh.)

employer had to take the people back and probably had to pay them back pay, didn't he?

A. Yes, I believe he did say something about that. He mentioned that.

Q. And he also gave you his opinion with respect to the need of the union out there, didn't he?

A. Well, he stated that he didn't think they needed a union there.

Q. That is right. He said he thought first you ought to take your squawk up to the boss, and then if you didn't get [163] it satisfactorily settled you ought to take him out and hang him, or words to that effect?

A. Words to that effect, yes, sir.

Q. And he also said that he thought the company shouldn't be unionized until after the boss had had a chance to straighten out the beefs, didn't he?

A. Yes, sir.

Q. In Mr. Potruch's talk to you did he say anything would happen to your employment relations if you voted for the union? A. No, sir.

Q. Did he ask anybody to withdraw from the union membership? A. No, sir.

Q. Did he ask anyone if they had been approached by the union?

A. I don't think so. [164]

\* \* \*

Q. Now, when you cast your ballot, it was a secret ballot, was it not? A. Yes, sir.

Q. You were handed the ballot by a Board agent? A. Yes, sir.

(Testimony of Lee E. Fitzhugh.)

Q. It never got out of your possession——

Mr. Nutter: Mr. Examiner, I object to this line of testimony.

Trial Examiner Myers: Overruled.

Q. (By Mr. Nicoson): It never got out of your possession until after you had marked it in a secret booth, is that right? A. Yes.

Q. And you deposited it in the ballot box with your own hands? A. Yes, sir.

Q. No one was in the booth while you were in there to mark it? A. No, sir.

Mr. Nicoson: That's all.

Trial Examiner Myers: Any redirect?

#### Redirect Examination

By Mr. Nutter:

Q. Mr. Fitzhugh, you testified on cross-examination that Mr. Herrick had another man come in and [165] help him after Mr. Leonard was discharged. Did you see Mr. Herrick and this other man working while you were employed there?

A. Yes, sir.

Q. And what was this other man doing?

A. He was helping on the frame machine, sir.

Q. And what was Herrick doing?

A. He was—oh, he would help him at times, and other times he was working on the front end.

Q. Herrick was working on the front end?

A. That is right.

Q. And this individual that was assisting Her-

(Testimony of Lee E. Fitzhugh.)

rick was working on the frame machine, is that right?      A. Yes, sir.

\* \* \*

Q. (By Mr. Skagen): Mr. Fitzhugh, you testified on cross-examination that you wore a union button. What kind of button did you wear?

A. It is an IAM.

Q. Do you know what kind of a button Mr. Leonard wore in the shop?

A. He wore a steward's button.

Q. Was that different from the other? [166]

A. Yes, sir.

Q. Do you—now, Mr. Fitzhugh, you stated on cross-examination, also, that certain machinery was moved outside the building from Mr. Leonard's stall, did you not?      A. Yes, sir.

Q. What was that?

A. It was a brake lathe.

Q. Brake lathe?      A. Yes, sir. [167]

\* \* \*

### CLAUDE LEONARD

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

#### Cross-Examination (Continued)

By Mr. Nicoson: [168]

Q. Now, on this occasion that you saw brake

(Testimony of Claude Leonard.)

work being done on the lube rack, I believe your testimony is that that is the only time that you saw it done there.

A. What do you mean the only time?

Q. Well, you saw Tiny Reeve making an adjustment on March 23, and then on March 24 you said somebody was bleeding the line?

A. That is the dates that I recall.

Q. I see. All right. You did see it done on other occasions?

A. On other occasions.

Q. And over what period of time?

A. More so in February than March.

Q. But you did see it prior to February and March, didn't you?

A. I can't say that, because I didn't check.

Q. You didn't check. So, so far as your knowledge is concerned you don't know whether they were doing brake adjustments on the lube rack all along or not, do you? [170]

A. I know that. I was doing more of them before that.

Mr. Nicoson: Mr. Examiner, may I have an answer to my question?

Trial Examiner Myers: Strike out the answer.

Will the reporter please read the question to the witness.

(Question read.)

The Witness: I don't know.

Q. (By Mr. Nicoson): Now, with respect to the



(Testimony of Claude Leonard.)

doing of stop-light switch work on the tune up, when did you make a check on that?

A. When I noticed him doing it was in February.

Q. You saw him only doing it once?

A. Two different occasions.

Q. Both in February?

A. I believe both in February.

Q. You made no check prior to that time?

A. No.

Q. So prior to that time you don't know whether this tune-up man had been doing that type of work all along or not, do you?

A. He had been putting in electric—tending to electric stop-light switches.

Q. You knew about that?

A. I knew about that. [171]

Q. Do you know of your own knowledge whether he had also been doing the other type of stop-switch work?

A. No, I do not. [172]

\* \* \*

### GEORGE ALBERT SMITH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined as and testified as follows:

\* \* \*

#### Direct Examination

By Mr. Nutter:

\* \* \*

Q. (By Mr. Nutter): And were you formerly employed at Howell Chevrolet?

(Testimony of George Albert Smith.)

A. Yes. [178]

Q. When was that?

A. From about March in 1950 and about six months following.

\* \* \*

Q. (By Mr. Nutter): Mr. Smith, I show you a card, an authorization card of the IAM and ask you if you can identify that signature.

A. I can. It is my signature.

Q. Is that your signature? A. Yes, sir.

Q. Did you fill it out? A. Yes.

Mr. Nutter: I now offer General Counsel's No. 19 in evidence.

Trial Examiner Myers: When did you fill it out?

Mr. Nutter: The date is on the card.

Trial Examiner Myers: What?

Mr. Nutter: The date is on the card. I asked him if he filled it out. I assume he filled it out on the date that [179] it bears.

Q. (By Mr. Nicoson): Did you put that date in there? A. That is right.

Q. Is that the date marked there?

A. That is right.

\* \* \*

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 19 and was received in evidence.)

(Testimony of George Albert Smith.)

GENERAL COUNSEL'S EXHIBIT No. 19

Authorization for Representation under the  
National Labor Relations Act

I A of M

I, the undersigned, employee of Howell Chev. Co.;  
Address, 1000 Brand Blvd., Glendale, Calif.

hereby authorize the Machinists' District Lodge  
727 to represent me in negotiations for better wages,  
hours and other conditions of employment in ac-  
cordance with the provisions of the National Labor  
Relations Act. Information on this card is held  
in strict confidence.

This does not obligate me financially in any way.

/s/ GEORGE A. SMITH.

(Signature.)

GEORGE A. SMITH.

(Print Name.)

Address: 1812 Brand Blvd.

Kind of Work: Body & fender.

Date: April 24, 1950.

City: Glendale.

Phone: . . . . .

Dept: . . . . .

Admitted November 1, 1950.

---

Q. (By Mr. Nutter): Now, Mr. Smith, what  
were your duties at Howell Chevrolet?

A. Body and fender work.

(Testimony of George Albert Smith.)

Q. Did you have a foreman there?

A. Yes.

Q. Who was that man? A. Frank Ogen.

Q. Now, did you have any discussion with Mr. Ogen about the union at any time while you were at Howell Chevrolet?

A. Oh, several times he would come out and ask me what I [180] was going to do about the union, or whether I was in the union, or things like that.

Q. Now, can you tell us when this was and where it was?

A. It probably took place three or four—about three weeks before the election on June 1st.

Trial Examiner Myers: What do you mean “probably”? Do you mean about?

The Witness: About.

Q. (By Mr. Nutter): And whereabouts was this? A. Out in the yard.

Trial Examiner Myers: What yard?

The Witness: Where the cars are parked.

Trial Examiner Myers: Howell Chevrolet?

The Witness: Yes.

Q. (By Mr. Nutter): What time of day was this? Just tell us one occasion. What time of day was this that Mr. Ogen spoke to you?

A. Probably around 10:30, 11:00 o'clock in the morning.

Q. Now, who was present?

A. Nobody but myself.



(Testimony of George Albert Smith.)

Q. Now will you tell us what was said in this conversation.

A. Well, he saw me talking to George Kirkland and he asked me, "Has George got you to join the union yet?"

Q. What did you say?

A. I told him, "I have always been a union man." [181]

Q. Was there anything else to the conversation?

A. No, I don't believe so.

Q. Did you talk on any other occasion to Mr. Ogen about the union?

A. Oh, sometimes he would come up and make a pass at me in just a kidding way—I don't know if he meant anything about it, and dropped it—"How you doing about the union," and something like that. Then forget about it and walk off.

Q. When was this?

A. Oh, on several occasions after the previous time I mentioned just now.

Q. I think we stipulated in the record that the election was held on June 1, 1950.

A. That is right. [182]

\* \* \*

Q. You worked in the body shop with Mr. Ogen, did you, or under him?      A. Yes.

Q. Now, can you remember in substance what he said to you on one of these occasions?

A. Well, on one occasion he told me that any man that joined the union would be fired.

(Testimony of George Albert Smith.)

Q. Was there anything else said on that occasion?

A. He never did work in a union shop; he never would. He wouldn't have any union men working under him.

Q. You say this took place just before the election?

A. Yes.

\* \* \*

Q. Did you ever talk to him about the union, or did he talk to you about the union? [183]

A. Only on one occasion. I think we went off the premises at the time.

Q. And will you tell us what that was, where it took place and who was present.

A. Ken Herrick was present and it was at a place known as the Playhouse.

Q. The Playhouse? A. Yes.

Q. Is that where they put on plays?

A. No, it is a bar.

Q. Whereabouts is that?

A. I don't know. It is on one of the streets over in Glendale.

Q. When did this take place?

A. That was just prior to the election or to the vote.

Q. How soon prior to the election?

A. I don't imagine over two weeks at the most.

Q. Now, will you tell us what took place there at the Playhouse Cafe, or bar, is it?

A. Well, Mr. Bordeau and Ken Herrick were

(Testimony of George Albert Smith.)

talking together and were talking about the union. Mr. Bordeau said that if the union went in that Howell would shut his doors.

Q. Did you say anything?

A. I wasn't interested in that conversation at all.

Q. Was there anything else to the [184] conversation?

A. Oh, personal business of my own, yes. Nothing concerning the vote or the union, or anything like that.

Q. Were you seated with Mr. Bordeau?

A. I was standing right back of him.

Q. Standing beside him? A. Yes.

Q. And where was Mr. Herrick?

A. He was standing on the other side of him.

Trial Examiner Myers: The three of you were standing at the bar?

The Witness: No. Mr. Bordeau was seated on a stool. The other two of us were standing right behind him.

Trial Examiner Myers: At the bar?

The Witness: Yes.

Q. (By Mr. Nutter): Was there anything else to that conversation about the union?

A. No, not that I can remember. In fact, I didn't pay too much attention to that conversation.

\* \* \*

Q. Did Mr. Howell ever talk to you about the union at any time you were employed there?

A. Just before the election day, yes.

(Testimony of George Albert Smith.)

Q. How long before?

A. The vote; probably two or three or four days. [185]

Q. And where was that?

A. In the body shop.

Q. What were you doing in the body shop?

A. Working bodies and doing fender work.

Q. And what time of day was this?

A. As near as I remember it was in the forenoon—probably 11:00 o'clock.

Q. Was there anybody else present there with you?

A. Several men working there. They wasn't right near me.

Q. Pardon?

A. They wasn't standing right near me, but they was working in the shop.

Q. Now, will you tell us what the conversation was and what took place.

A. Well, Mr. Howell told me that he didn't want the National Labor Board in there to tell him how to run his business.

And that if the union was voted out, they won the vote, they was going to 50 per cent the first of the month, which would be June the 1st.

Q. Said there was going to be what?

A. They would go to 50 per cent. That would be on June 1st.

Q. You mean commission rates?

A. Commission rates.



(Testimony of George Albert Smith.)

Q. Is that what you mean by going to 50 per cent? [186]      A. Right.

Trial Examiner Myers: What were they at that time?

The Witness: 40 per cent.

Q. (By Mr. Nutter): Was there anything else said in the conversation?

A. Oh, only talking about interstate commerce, having to have so much interstate commerce, and one thing and another before the Labor Board could come in. Something to that effect. That's something I never could understand.

\* \* \*

Q. Now, did you attend any sort of a banquet following the election?      A. Yes.

Q. Where was that?

A. The Mayfair Hotel.

Q. Pardon?

A. The Mayfair Hotel in Glendale.

Q. When was that?

A. That was probably a week or ten days after the election. I don't remember just the date.

Q. Who was present at this banquet? [187]

A. Well, all the fellows in the body shop, mechanics, tune-up men, lube rack, Mr. Howell, Mr. Bordeaux, and Frank Ogen and Frank Wergen.

Q. Who?

A. Frank Wergen.

Q. With all the production and maintenance employees, was it, or was it all the employees of Howell?

(Testimony of George Albert Smith.)

A. I mean, then, it was all the men employees of the shop.

\* \* \*

Q. (By Mr. Nutter): Now, were there any speeches made at this banquet?

A. Oh, Mr. Howell made a little speech, yes, something about it wasn't just an accident the meeting come up just at the time. He went on to tell that the body shop was going to 50 per cent due to keen competition in the business. Mechanics, front end and brake men was going to 45 per [188] cent.

\* \* \*

Q. Did you, while you were employed at Howell Chevrolet, hear any speech made by Mr. Potruch?

A. Yes.

Q. And when was that?

A. Oh, the first one was shortly after I went there. I didn't pay too much attention to that speech because I wasn't interested in the union at the time. I didn't pay too much attention to it. That was when they were all called in as a group on the service floor.

\* \* \*

Q. Did you hear another speech by Mr. [189] Potruch? A. Yes.

Q. When was that?

A. That was possibly a week or ten days before the vote on June 1st.

Q. Where did that take place?

A. That took place in Mr. Bordeau's office.

(Testimony of George Albert Smith.)

Q. Who was present?

A. Frank Ogen, the two grease men, and let's see, one, two, three—three or four body men and Mr. Bordeau.

Trial Examiner Myers: And you.

The Witness: Right.

Q. (By Mr. Nutter): Now, will you tell us what Mr. Potruch said at that meeting.

A. Well, he had a sample ballot there at the time. At that time he told us how we could vote, how to mark the ballots one way or the other way, and went on to explain about that the union would never do us any good. He brought up an example of Baldwin Chevrolet where they hired gangsters, or one thing or another like that, to come in there and break up a strike. He told us that there would be a new deal after the first of the month, but that at that time he could not make a statement as to what it would be; but that there would be a new deal. [190]

\* \* \*

Q. Now, you previously told us how Mr. Howell spoke to you in the body shop.

A. That is right.

Q. Was there anybody, another employee around?

A. There was another man, but he was about two cars away and he is hard of hearing. He is deaf and dumb, as a matter [191] of fact.

Q. Who is that?



(Testimony of George Albert Smith.)

A. Mr. Daly. We also refer to him as the old man.

Q. I see. Well, when did you first see Mr. Howell that time?

A. Talking to Mr. Daly.

Q. And then what happened after you saw him talking to Mr. Daly?

A. He walked over to where I was working.

Trial Examiner Myers: Who walked over?

The Witness: Mr. Howell. He walked over to me and said he was just talking to the old man, which is Mr. Daly.

Q. (By Mr. Nutter): And what did he say?

A. He started telling me about what they were going to do after the first of the month if the union wasn't voted in.

Q. Did Mr. Howell say anything else?

A. Talking about strikes. Said that if the union did come in there would be a strike. And I told him at the time that I didn't like strikes, they were costly both ways, employees and employer.

Q. Was anything else said?

A. No, I don't believe so.

\* \* \*

Trial Examiner Myers: You say that he said what he would do after the first. What did he [192] say?

The Witness: That they would go to 50 per cent commission instead of 40. [193]

\* \* \*



(Testimony of George Albert Smith.)

Cross-Examination

By Mr. Nicoson:

Q. Now, these conversations that you had with Ogen about these unions. You say he was kidding, and you understood he was kidding, didn't you?

A. One time he came out and point blank asked me, after he saw me talking to George Kirkland on the lot, "Has George got you to join the union yet?" And I told him I had always been a union man.

Q. And you and Mr. Ogen had kidded back and forth about the union, hadn't you?

A. After that several times.

Q. Yes. That is right. And you understood it was kidding on the part of Mr. Ogen and on the part of yourself. [195]

A. Might have been kidding.

Q. Well, that is the way you understood it, wasn't it? A. Could have been. [196]

\* \* \*

PAUL ARNOLD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

\* \* \*

(Testimony of Paul Arnold.)

By Mr. Nutter:

Q. Were you formerly employed at Howell Chevrolet?      A. Yes.

Q. When was that?

A. June, in 1949, is when I first went to work.

Q. How long were you employed at Howell Chevrolet?

A. I quit there in February of '50. [200]

\* \* \*

Q. What were your duties there at Howell?

A. Metal man.

Q. Metal man?      A. Body and fender man.

Q. You worked in the body shop?

A. Yes.

\* \* \*

Q. (By Mr. Nutter): Mr. Arnold, I show you General Counsel's Exhibit 20, marked for identification, and ask you is that your signature?

A. Yes.

Q. Did you fill out that card?      A. Yes.

Q. Did you fill out the date here?      A. Yes.

Q. Is that January 31, 1950? [201]

A. Yes.

Q. Is that when you filled it out?      A. Yes.

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 20 for identification was received in evidence.)

(Testimony of Paul Arnold.)

GENERAL COUNSEL'S EXHIBIT No. 20

Authorization for Representation under the  
National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No. . . . ., Clock  
No. . . . ., Shift No. . . . ., Plant No. 1000  
Home Address—St.: 10262 Kewen.  
City: Pacoima.  
Tel. No.: . . . . .

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power  
or authority heretofore given to any person or  
organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 31, 1950.

/s/ PAUL W. ARNOLD.

(Signature of Employee.)

PAUL WHITTIER ARNOLD.

(Please Print Name.)

Admitted November 1, 1950.

(Testimony of Paul Arnold.)

Q. (By Mr. Nutter): Did I ask you who your foreman was when you worked out at Howell?

A. Yes.

Q. Mr. Ogen, was it? A. Yes.

Q. Did you ever talk with Mr. Ogen about the union?

A. Yes, one time I did, right after I filled a card out.

Q. How long was that after you filled the card out?

A. Well, I think it was maybe a day or two later. I am not sure exactly.

Q. And where did this conversation take [202] place? A. In the body shop.

Q. During working hours, was it?

A. Yes.

Q. And about what time of day was it?

A. Oh, I'd say sometime in the morning, just a little before noon, maybe.

Q. Was anybody else present?

A. Well, no one was present when I had the conversation.

Q. Now, will you tell us what the conversation was?

\* \* \*

A. Well, I asked him what he thought about the union, and he told me that—I asked him what he thought about the guys going in, and he said they better watch out for their jobs, because Howell said to fire them all that are wearing buttons.

\* \* \*



(Testimony of Paul Arnold.)

Q. (By Mr. Nutter): Did you have any discussion about buttons in this conversation? [203]

A. Just what I said.

Q. Were you wearing a union button?

A. No, I wasn't.

Q. Did you see anybody wearing a union button there in the shop? A. Yes, there was a few.

Q. Who was that?

A. I think—I don't know his name—Claude, I think is his name.

Trial Examiner Myers: Do you see him in the hearing room?

The Witness: Yes, he is back there.

Trial Examiner Myers: Whom do you mean? Will you stand up, please? Is that the man you mean?

The Witness: Yes, and Rose was wearing one for a while.

Trial Examiner Myers: Is that Claude Leonard you mean?

The Witness: Yes.

Mr. Nicoson: Who else was wearing one?

The Witness: Rose. His last name was Rose. He worked there with me, but I never did know his first name.

Q. (By Mr. Nutter): Was there anything more to this conversation you had with Mr. Hogan?

A. That was about it. I didn't ask him no more about it or say anything at all. [204]

(Testimony of Paul Arnold.)

Cross-Examination

By Mr. Nicoson:

Q. You went to Hogan with these questions, didn't you?

A. He came by the shop, and he had—he was back there and [205] I just asked him.

Q. All right. In other words, you started the conversation?

A. Yes, I started it.

Q. He didn't?

A. No.

Q. And you asked him for his opinion?

A. Yes.

Q. And he gave it to you?

A. Yes. [206]

\* \* \*

WILLIAM FRANCIS HANSEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

\* \* \*

By Mr. Nutter:

Q. And were you employed at Howell Chevrolet?

A. Yes, I was.

Q. When was that?

A. Around the first part of February, if I recollect.

Q. You first went to work there during the first part of February?

A. Yes, around there.

Q. 1950, was it?

A. Yes.

(Testimony of William Francis Hansen.)

Q. How long did you work there?

A. Oh, just about six months, or something like that.

Q. And what were you duties at Howell Chevrolet?  
A. Washing and polishing cars. [207]

\* \* \*

Q. Did Mr. Howell ever say anything to you about the union while you were employed at Howell Chevrolet?  
A. Well, he talked to me.

\* \* \*

Q. What did he say to you? When was that, now?  
A. I voted in favor of the plant.

Mr. Nicoson: That answer is not responsive, and I move that it be stricken.

Trial Examiner Myers: The question is, when did he speak to you?

Strike the answer.

The Witness: I don't know the date. [209]

Q. (By Mr. Nutter): Well, approximately—did you vote in the election on June 1, 1950?

A. Yes, I did.

Q. Can you place the date in relation to the election?  
A. I can't remember the date.

Q. Was it before or after the election?

A. Oh, before.

Q. How long before?

A. A few days, I imagine, as close as I can remember.

Q. And whereabouts did you have this conversation with Mr. Howell?

(Testimony of William Francis Hansen.)

A. Well, right next to where we washed the cars, where they polish them.

Q. And about what time of day was it?

A. Oh, in the morning, as I remember.

Q. What were you doing?

A. Putting on my boots.

Q. Then what happened?

A. That is when he came and talked to me.

Q. Mr. Howell talked to you? A. Yes.

Q. What did he say?

Mr. Nicoson: No proper foundation has been laid.

Trial Examiner Myers: Who else was there?

The Witness: Just myself. [210]

Trial Examiner Myers: Just you and Mr. Howell?

The Witness: Yes, sir.

Trial Examiner Myers: The objection is overruled.

Q. (By Mr. Nutter): What did he say?

A. He just asked me if I would vote in favor of the plant, and I said, "I will do my best."

\* \* \*

Q. Did you attend a banquet shortly after the election for the employees of Howell Chevrolet?

A. Yes, I did.

Q. Did Mr. Howell speak at that banquet?

A. He made a little speech.

Q. Can you tell us what he said?



(Testimony of William Francis Hansen.)

A. I can't remember everything.

Q. Just what you can recall.

A. Well, something about a raise—he didn't say how much, but we would get a raise. We would have to wait a few days or a month or 30 days before we short-timers would get one, and that's about all. [211]

\* \* \*

Q. Now, coming back to this meeting that you had with Mr. Howell at the wash rack when you were putting on your boots, do you further recall anything else that was said by Mr. Howell?

A. No, I don't.

Q. Do you mean you can't remember anything else that he said?

A. I have forgotten everything.

Q. Pardon?

A. I have forgotten all that stuff.

Q. Do you remember Mr. Howell saying anything to you about a raise at this—

A. At the banquet, yes. [212]

\* \* \*

Q. (By Mr. Nutter): You don't recall anything about that?

A. No, I have forgot it all. [213]

\* \* \*

Q. You made a statement and you swore to it, and you read it over, is that right? A. Yes.

Q. Now, I direct your attention to the first page

(Testimony of William Francis Hansen.)

of the document, to the last paragraph, and ask you to read that, particularly where it starts, "He said," and read that over. That is six lines from the bottom.

Have you read it over?           A. Yes.

Q. Now, after reading that over, does that refresh your memory as to what Mr. Howell said to you when you were putting on your boots on that morning, prior to the election?           A. Yes.

Q. What was it?

A. He just asked me if I would vote the way of the company, and he would see that we got a raise in time; so I did.

Q. Was there anything else to the conversation?

A. No. [214]

\* \* \*

Q. (By Mr. Nutter): Do you know Mr. Bordeaux?           A. Yes, I do.

Q. Was he the service manager at Howell?

A. Yes.

Q. Did you ever talk to Mr. Bordeaux about the union?           A. No, I never did.

Q. Did Mr. Bordeaux ever speak to you about the union?           A. Not that I can recall. [215]

\* \* \*

D. A. GORDON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Nutter:

Q. Mr. Gordon, what is your occupation?

A. I am an organizer for the District Lodge 727, International Association of Machinists.

Q. How long have you been engaged as an organizer for 727? [216]

A. Approximately a year and three months.

\* \* \*

Mr. Nutter: I now offer General Counsel's Exhibit 23 in evidence.

Mr. Nicoson: No objections.

Mr. Skagen: No objections.

Trial Examiner Myers: Any question about the letter being received?

Mr. Nicoson: No question raised about the foundation. We stipulate we received the original.

Trial Examiner Myers: When did you receive it?

Mr. Potruch: Whenever the return receipt says on there. [217]

Trial Examiner Myers: It says February 1.

Mr. Potruch: That's all right.

Trial Examiner Myers: Is that when you received it?

Mr. Nicoson: So stipulated.

\* \* \*

(Testimony of D. A. Gordon.)

(The document heretofore marked General Counsel's Exhibit No. 23 for identification was received in evidence.)

## GENERAL COUNSEL'S EXHIBIT No. 23

### Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. Howell Chevrolet Co.

(Signature or name of addressee)

2. E. Casselman.

(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery: 2-1-50.

January 31, 1950.

Howell Chevrolet Company,  
1000 S. Brand Blvd.,  
Glendale, California.

Attention: Mr. Jackson Howell.

Dear Mr. Howell:

Please be advised that the International Association of Machinists, District Lodge 727, represents a majority of your mechanics, lube men, parts men, body and fender men, painters, service mechanics, maintenance men and working foremen employed at your shop located at 1000 S. Brand Blvd., Glendale, California.



(Testimony of D. A. Gordon.)

Therefore, we request recognition for the purpose of representing the employees in the above-described bargaining unit in regard to hours, wages, working conditions and other conditions of employment.

We desire a meeting for the purpose of negotiating a collective bargaining agreement at your earliest possible convenience. Upon failure to grant such recognition and conference, petitions for Certification of Representation will be filed with the National Labor Relations Board.

Very truly yours,

D. A. GORDON,

Organizer, District 727, I.A.M.

DAG:sl

cc: R. M. Brown, G.V.P.

L. E. Poesnecker, G.L.R.

John Snider, President, District 727.

Admitted November 1, 1950.

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Trial Examiner Myers: While we are at it, Mr. Nicoson, I notice in your answer you deny that the International Association of Machinists, District Lodge 727, is a labor organization within the meaning of the Act. Do you press your denial?

Mr. Nicoson: Oh, I think we might stipulate that it approximates a labor organization within the meaning of the Act.

Trial Examiner Myers: Very well.

(Testimony of D. A. Gordon.)

Mr. Nicoson: We stipulate that the union is a labor organization within the meaning of the [218] Act.

\* \* \*

Trial Examiner Myers: Now, was any answer made to either one of these letters, Mr. Nicoson?

Mr. Nicoson: General Counsel's 24-A is an answer to 24.

Trial Examiner Myers: Oh, I see. But no answer was made to General Counsel's Exhibit No. 23; is that right?

Mr. Nicoson: That is correct. [220]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 31 for identification was received in evidence.)

\* \* \*

#### GENERAL COUNSEL'S EXHIBIT No. 31

##### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No....., Clock  
No....., Shift No....., Plant No.....

Home Address—St.: 3032 Sierra St.

City: Los Angeles.

Tel. No.: CA 19827.

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-

(Testimony of D. A. Gordon.)

tive Bargaining Agent with respect to wages, hours of employment, and other conditions of employment, in accordance with the provisions of the National Labor Relations Act.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 30, 1950.

/s/ PHILIP CABALLERO.

(Signature of Employee.)

PHILIP CABALLERO.

(Please Print Name.)

Admitted November 1, 1950.

---

EDWARD M. SKAGEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Nutter:

Q. Mr. Skagen, what is your occupation?

A. I am a Grand Lodge representative of the International Association of Machinists. [236]

Q. And what are your duties?

(Testimony of Edward M. Skagen.)

A. My duties are the preparation, handling of cases before the National Labor Relations Board, and other matters pertaining to the official duties of representatives of the International Association of Machinists.

Q. Do you engage in organizing work in the union?

A. I attend various organizational meetings, and I write organizational literature on occasions.

Q. And have you attended organizational meetings in District Lodge 727?            A. I have. [237]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 32 for identification was received in evidence.) [239]

## GENERAL COUNSEL'S EXHIBIT No. 32

### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co., employed at Glendale, Calif., Dept. No. . . . . , Clock No. . . . . , Shift No. . . . . , Plant No. . . . .

Home Address—St.: 1316 Mohawk St.

City: Los Angeles.

Tel. No.: DU 40595.

hereby authorize the International Association of Machinists to represent me as my exclusive Collective Bargaining Agent with respect to wages, hours of employment, and other conditions of employment,



(Testimony of Edward M. Skagen.)

in accordance with the provisions of the National Labor Relations Act.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 30, 1950.

/s/ KENNETH I. HERRICK.

(Signature of Employee.)

KENNETH I. HERRICK.

(Please Print Name.)

Admitted November 1, 1950.

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\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 26 for identification was received in evidence.) [240]

## GENERAL COUNSEL'S EXHIBIT No. 26

### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No. . . . . , Clock  
No. . . . . , Shift No. . . . . , Plant No. . . . .

Home Address—St.: 311 E. Colorado St.

City: Glendale.

Tel. No.: . . . . .

hereby authorize the International Association of

Machinists to represent me as my exclusive Collective Bargaining Agent with respect to wages, hours of employment, and other conditions of employment, in accordance with the provisions of the National Labor Relations Act.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 30, 1950.

/s/ BOYCE E. SKELTON.

(Signature of Employee.)

BOYCE E. SKELTON.

(Please Print Name.)

Admitted November 1, 1950.

---

CLAUDE LEONARD

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Nutter: [246]

\* \* \*

Q. Mr. Leonard, I show you an authorization card that is marked General Counsel's 34 for identification, and ask you if you can identify that?

A. Yes, sir.

Q. What is that?

(Testimony of Claude Leonard.)

A. That is an authorization card signed by Henry Gobelman. That was February 1, I believe.

Q. I notice there is no date on there,——

A. No.

Q. ——Mr. Leonard. Now, can you tell me where this was signed and the circumstances?

A. The reason I recall it is that it was the day after I was over there and received the other fellow's. [247]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 34 for identification was received in evidence.)

Q. (By Mr. Nutter): Now, Mr. Leonard, I have had marked for identification General Counsel's Exhibit No. 35. I show you this authorization card, and I ask you if you can identify that?

A. Yes, that is an authorization card signed by Joseph F. Price. He was a mechanic working at Howell Chevrolet. His stall was next to mine.

Q. And when did he sign this?

A. January 30, 1950.

Q. Did you see him sign this? I know this is printed down here.

A. Yes, this is printed down here.

Q. Did you see him print it?

A. He printed it out.

Q. I notice this card is filled out up here. Did you fill this out?

A. I filled it out there. I remember the day. He was busy; his hands were all dirty, and I asked

(Testimony of Claude Leonard.)

him about it, and he said, "Go ahead and fill it out, and I will sign it." [249]

Q. What time of day was this?

A. In the morning.

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 35 for identification was received in evidence.) [250]

### GENERAL COUNSEL'S EXHIBIT No. 35

#### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No....., Clock  
No....., Shift No....., Plant No.....

Home Address—St.: 9051½ E. Chevy Chase.

City: Glendale.

Tel. No.: .....

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power  
or authority heretofore given to any person or  
organization to represent me.

This does not obligate me financially in any way.



(Testimony of Claude Leonard.)

Date: Jan. 30, 1950.

/s/ .....

(Signature of Employee.)

JOSEPH F. PRICE.

(Please Print Name.)

Admitted November 2, 1950.

\_\_\_\_\_  
\* \* \*

JOSEPH ROSE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Nutter:

Q. Mr. Rose, were you employed at Howell Chevrolet? A. I was.

Q. Can you tell us when that was?

A. Well, I don't remember the exact dates.

Q. Approximately?

A. But approximately four months, I should say.

Q. In what year?

A. Probably February was the time I left there, their employment.

Q. Of what year, February of what year? [252]

A. '49.

(Testimony of Joseph Rose.)

Q. 1949?

A. Yes; 1949, yes. It was this year.

Q. This year is 1950. A. '48 and '49.

Trial Examiner Myers: When did you leave?

Q. (By Mr. Nutter): This year is 1950.

A. Well, I would say approximately February of this year.

Q. That is 1950.

A. Yes, I got my dates crossed up.

Q. What were your duties there?

A. I was metal mechanic.

\* \* \*

Q. (By Mr. Nutter): Mr. Rose, I show you this card marked General Counsel's Exhibit No. 36 for identification, and call your attention to the signature there. Can you tell me what that is?

A. That is my signature; that is the card I signed with the union.

Q. And did you fill out the card?

A. I did.

Q. On what date did you fill it out?

A. On the date that is marked there.

Q. January 31st? [253] A. January 31st.

Q. 1950? A. 1950.

Trial Examiner Myers: Did you sign it on that date?

The Witness: I did.

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 36 for identification was received in evidence.) [254]

(Testimony of Joseph Rose.)

GENERAL COUNSEL'S EXHIBIT No. 36

Authorization for Representation under the  
National Labor Relations Act

I, the undersigned, employee of Howell Chev. Co.,  
employed at Glendale, Calif., Dept. No. Mech., Clock  
No. . . . ., Shift No. . . . ., Plant No. . . . .  
Home Address—St.: 2346 Flower Pl.  
City: Los Angeles.

hereby authorize the International Association of  
Machinists to represent me as my exclusive Collec-  
tive Bargaining Agent with respect to wages, hours  
of employment, and other conditions of employment,  
in accordance with the provisions of the National  
Labor Relations Act.

The full power and authority to act for the under-  
signed as described herein supersedes any power  
or authority heretofore given to any person or  
organization to represent me.

This does not obligate me financially in any way.

Date: Jan. 31, 1950.

/s/ JOSEPH ROSE.

(Signature of Employee.)

JOSEPH ROSE.

(Please Print Name.)

Admitted November 2, 1950.

## BOYCE SKELTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

## Direct Examination

By Mr. Nutter:

Q. Mr. Skelton, were you employed at the Howell Chevrolet? [256]

Q. Are you employed there now? A. No.

Q. When were you last employed there?

A. I don't remember the exact date. I think it was about four months ago.

Q. Four months ago? A. Yes.

Q. And were you employed there at the time of the election in June of 1950? A. Yes.

Q. And when did you first go to work at Howell?

A. Well, that was in 1949; I think it was in November.

Q. And what were your duties at Howell Chevrolet? A. Oh, delivery, tow truck.

Q. Pardon? A. Delivery and tow truck.

Q. You delivered automobiles and you drove the tow truck, is that it? A. That is right.

Q. Now, do you know Mr. Howell?

A. Yes, I do.

Q. And prior to the election in 1950, did Mr. Howell speak to you at all about the union?

A. Well, just one time.

Q. And when was that? [257]



(Testimony of Boyce Skelton.)

A. That was before the election. I don't know how long before—two weeks, a week, I don't know.

Q. And whereabouts was it that he spoke to you?

Trial Examiner Myers: Do you mean about a week or two before the election?

The Witness: Yes, something like that.

Q. (By Mr. Nutter): And whereabouts did you have this conversation?

A. This was just there on the grounds.

Q. Grounds of the company? A. Yes.

Q. And could you tell us about where it was?

A. You mean whereabouts on the grounds?

Q. Yes. Where were you customarily employed?

A. It was on the parking lot there that they have.

Q. A parking lot; and was there anyone else present besides yourself and Mr. Howell?

A. No.

Q. Now, will you tell what was said at this conversation?

A. Oh, it was just that if the union was defeated, why, everybody would get a raise. [258]

\* \* \*

Q. How did the conversation open up?

A. I don't remember all that was said. It was too long ago. That was the whole point in the conversation.

Q. Did you say anything in answer?

A. Well, yes, but I don't remember what I said.

(Testimony of Boyce Skelton.)

Q. Well, do you recollect anything else of the conversation?

A. No, we just talked for just about a minute, was about all.

Q. Well, did he approach you or did you approach him?

A. Well, we were walking along and he said, "Good morning," or something like that; and he stopped, and that is when we started talking.

\* \* \*

Q. Do you know Mr. Bordeau?

A. Yes, I do—service manager at Howell—yes.

Q. Did he ever talk to you about the union prior to the election?      A. Not personally, no.

Q. Well, did he ever talk to you in a group of other men?      A. Yes.

Q. And when was that?

A. Well, I don't know; about the same length of time before the election, I guess.

Trial Examiner Myers: You mean about a week or two before [259] the election?

The Witness: A week or two before, somewhere around there.

Q. (By Mr. Nutter): And whereabouts was this conversation? Where did it take place?

A. It was at the company.

Q. And whereabouts at the company?

A. Well, it was on the grounds somewhere. I don't remember. It was either in the service department or on the grounds.

(Testimony of Boyce Skelton.)

Q. By the grounds you mean the parking lot?

A. The parking lot, yes.

Q. And who were present?

A. Well, I can't say because I don't remember.

Q. Could you tell me approximately how many men were present?

A. Oh, three or four maybe—five, I don't know.

Trial Examiner Myers: Were these three or four or five people employees of Howell?

The Witness: Yes.

Q. (By Mr. Nutter): And do you remember what time of day it was? A. No, I can't.

Q. Now, what did Mr. Bordeau say?

A. Well, I imagine it——

Trial Examiner Myers: Do not tell us what you imagine.

Q. (By Mr. Nutter): Tell us what he said.

Trial Examiner Myers: Tell us what you remember. [260]

The Witness: Oh, about the same thing that I said before there.

Mr. Nicoson: Move to strike the answer as not responsive.

Trial Examiner Myers: Strike the answer. You have to tell us just what you remember what Mr. Bordeau said, and what the other people said. Just try to recollect what there was said.

The Witness: I don't remember the exact words.

Trial Examiner Myers: I just said tell us what you remember.

(Testimony of Boyce Skelton.)

Mr. Nutter: In substance what he said.

Trial Examiner Myers: Of course you cannot remember the exact words.

The Witness: Well, it all boiled down that if the union was defeated——

Mr. Nicoson: Object to what it all boiled down to as a conclusion of the witness.

Trial Examiner Myers: Strike that. Now, without going through those formalities, just try to tell us what you remember he said. We know you cannot tell us exactly what he said.

The Witness: Well, it added up to——

Trial Examiner Myers: Do not say “it added up to” or “boiled down,” or this and that.

The Witness: Well, he said that if the union was defeated that everybody would get a raise.

Q. (By Mr. Nutter): Anything else said? [261]

A. No.

Q. Well, did this group of employees break up then after this, or what happened?

A. Yes, it was just a conversation.

Q. How did the employees happen to gather there at that time?

A. Just—I don’t know. The employees gather when there isn’t much to do; they just stand around and talk. [262]

\* \* \*

### Cross-Examination

By Mr. Nicoson:

Q. Now, this time that you spoke about Mr.



(Testimony of Boyce Skelton.)

Bordeau having something to say, that was an occasion when the men were just standing around shooting the breeze when you did not have anything to do; is that right?      A. That is right.

Q. And that happens when in slack business the boys hang around and start talking and they come around and join in the conversation? That is one of those such days?      A. Right.

\* \* \*

Q. Now, how did that subject come up?

A. Well, there was a lot of talk at that time about the coming election, and when anybody got together, you know, that is what they usually talked about. So that is how the subject [268] was brought up.

Q. Was there some talk about the election in this group that day?

A. Yes, I believe there was.

Q. Was that before or after Mr. Bordeau made this statement?      A. Well, it was before.

Q. Is it not a fact that Mr. Bordeau told you that the company could not give you an increase because of the pending of the election? Is that right? He said something like that, did he not?

A. I don't remember.

Q. And he also said that if the union won the election then the increases would be up to the union?      A. Yes, that is right.

Q. And he said in the alternative that on the other hand if the union did not succeed, then the

(Testimony of Boyce Skelton.)

company could be free to give such deals to the men as it wanted to?      A. That is right.

Q. And that is what he said?

A. That is right.

Q. Now, the reporter does not get the nodding of your head.

A. I said, "That is right." [269]

\* \* \*

### EDWARD DALY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Nutter:

Q. Mr. Daly, where are you employed?

A. For Howell Chevrolet.

Q. And how long have you worked at the Howell Chevrolet?

A. I work there altogether about nine [271] years.

\* \* \*

Q. (By Mr. Nutter): I show you a card, Mr. Daly; is that your signature?      A. Yes.

Q. Did you sign that?

A. Yes—this is to find out what it is all about.

Trial Examiner Myers: Did you sign that card?

The Witness: I didn't sign the second one, and I didn't pay a penny in the union. I just signed

(Testimony of Edward Daly.)

that that if the union happened to take over the place, I have to go with them. Otherwise, I have to get out.

Q. (By Mr. Nutter): Did you sign that January 31st?

A. Yes—that is a long while back.

Trial Examiner Myers: Did you sign that card on January 31, 1950?

The Witness: 1950, yes. [272]

\* \* \*

(The document heretofore marked General Counsel's Exhibit No. 37 for identification was received in evidence.) [273]

## GENERAL COUNSEL'S EXHIBIT No. 37

### Authorization for Representation under the National Labor Relations Act

I, the undersigned, employee of Howell Chevrolet Co., employed at Fender & Body, Dept No....., Clock No....., Shift No..... Plant No.....  
Home Address—St.: 1250 4th Ave.

City: L. A.

Tel. No.: .....

hereby authorize the International Association of Machinists to represent me as my exclusive Collective Bargaining Agent with respect to wages, hours of employment, and other conditions of employment, in accordance with the provisions of the National Labor Relations Act.

(Testimony of Edward Daly.)

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me.

This does not obligate me financially in any way.

Date: 1/51.

/s/ ED DALY.

(Signature of Employee.)

ED DALY.

(Please Print Name.)

Admitted November 2, 1950.

\* \* \*

Mr. Nutter: I want to make one request I made of Mr. Potruch, whether he will stipulate that the pay roll of February 1st was also for January 31, 1950.

Trial Examiner Myers: 1950?

Mr. Nutter: 1950. I think that is General Counsel's Exhibit No. 8.

Mr. Potruch: We so stipulate.

Trial Examiner Myers: That the same persons were employed on January 31, 1950, whose names appear on that list submitted by the company, headed, "Feb. 1, 1950"? Is that right?

Mr. Potruch: That is right, sir.

Trial Examiner Myers: Is that acceptable to you, Mr. Nutter?



Mr. Nutter: It is acceptable. [275]

\* \* \*

Mr. Nicoson: At this time respondent would like to renew its motion previously made with respect to the lack of jurisdiction of the National Labor Relations Board over this Respondent on the same grounds as previously stated.

Trial Examiner Myers: I will reserve decision.

Mr. Nicoson: We further move that the complaint be dismissed in its entirety on the ground that there is no sufficient and substantial evidence to sustain the allegations of the complaint.

Trial Examiner Myers: Motion denied, that is, to the issues involved here, except as to the motion with respect to jurisdiction.

\* \* \*

### JACKSON HOWELL

a witness recalled by and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Nicoson: [276]

\* \* \*

Q. What is your business or occupation?

A. President of Howell Chevrolet Company, Glendale.

Q. Where is Howell Chevrolet Company located? A. 1000 South Brand Boulevard.

(Testimony of Jackson Howell.)

Q. What is the Howell Chevrolet Company?

A. Automobile agency.

Q. Is that a corporation? A. Corporation.

Q. Were you president of that corporation during the period of 1950 up to now?

A. Yes, sir.

Q. And were you also president of the corporation on January 1, 1950? A. Yes.

\* \* \*

Q. When was the first time that you had learned that there was any union activity among the employees of your company, sir?

A. When I was served with notice by the National Labor Relations Board. I don't know which came first, whether the union activities or the one from the National Labor Relations Board; but whichever came first, that was the first notice I had.

Q. I show you a document which is in evidence as General [277] Counsel's Exhibit 23, and ask you to examine it and state if that is one of the notices you received from the union and to which you have just referred?

\* \* \*

Q. And then did you thereafter issue any instructions to any of your employees or supervisors?

A. Yes. Upon the advice of Mr. Potruch I instructed Chub Bordeau, our service manager; Bob Roberts, our used car manager; Jerry Whitten, our parts manager.

Q. What instructions did you issue to them?

(Testimony of Jackson Howell.)

A. That there was to be as a result of the action no partiality shown in any direction, no discrimination as far as any of the employees were concerned. No one was to be fired, and our position would remain absolutely neutral in the entire matter.

Q. So far as you know, have those instructions been carried out to the letter?

A. To the best of my knowledge, they have.

Q. Did you issue any other instructions to your supervisors [278] other than what you have just related?

A. Well, on numerous occasions from the original date, I checked with the department heads, conferred with them, and emphasized and reemphasized the point that none of the people that were obviously in the union were to be discriminated against in any manner, shape or form.

Q. And by those obviously in the union you meant those that had been seen wearing union buttons, is that correct?

A. Had been seen wearing union buttons.

Q. There has been some testimony about Mr. Potruch making a talk or a speech to the employees of your company. Do you know anything about that?

A. Yes, I was there at the time of the speech, the time the initial speech was made.

Q. Do you know which of your employees were in attendance?

A. All of the employees that were at work that

(Testimony of Jackson Howell.)

day that were employed in the shop—the main shop, the paint shop, the body shop, the used car refinishing, the lube rack, and the used car mechanics and the parts men.

Q. Now, is it a fact that these were all assembled in one place?

A. One place in the rear of the shop.

Q. And about what time of day did that occur?

A. I think it occurred before noon.

Q. And do you know on what date it [279] occurred?

A. No, I don't. I don't recall the date.

Q. What is your best recollection as to the date?

A. I believe it was in March, March or April.

Q. At that time did you have anything to say to the employees?

A. Yes, yes, I did.

Q. What did you say?

A. I introduced Mr. Potruch as the attorney for Howell Chevrolet. I told the men that no doubt they, that many of them, were familiar with the fact that there were some union activities going on and that I had hired Mr. Potruch, of the firm of Carter & Potruch, to represent me and that I wanted him to talk to them to explain the company policies.

Q. Did you have anything else to say at that time?

A. At the conclusion of his talk I adjourned the meeting.

Q. Those are the only things that you said dur-



(Testimony of Jackson Howell.)

ing the entire time the employees were assembled there?      A. That is right.

Q. I take it Mr. Potruch did make some remarks to the employees?      A. He did.

Q. Will you now state to us best as you can recall what Mr. Potruch said at that time and place?

A. Well, I don't know whether I have this in chronological order or not, but he told the men that there was no difficulty as far as Howell Chevrolet was concerned with the union; that Howell Chevrolet had nothing against the union; that the unions [280] had, in his opinion, a definite place in the picture. He told them that I felt and he felt that we didn't, being small merchants, come under the jurisdiction of the National Labor Relations Board; and then he went into some detail in that connection. Then he covered three phases of strike situations, three different types of strikes. I don't recall any of the details. My thinking was that it was impartial.

Mr. Nutter: Objection, Mr. Examiner. I object to his opinion as to the speech.

Mr. Nicoson: That may go out.

Trial Examiner Myers: Do not give us your conclusion. You were asked what Mr. Potruch said.

The Witness: He said further that he felt that the employees should in cases of difficulty try and work out their difficulties with their employer. If they endeavored to do that on a fair and honest

(Testimony of Jackson Howell.)

basis and were not able to get anywhere, I recall very vividly he said if he were in their position he would hang the employer.

He said further that we intended to stand on the position that we did not come within the jurisdiction of the National Labor Relations Board and that he would personally fight the case to my last [281] dollar.

\* \* \*

Q. Now, do you recall whether Mr. Potruch said anything to the effect that the union would never get a contract with the Howell Chevrolet Company?

A. I am positive he did not say that.

\* \* \*

Q. (By Mr. Nicoson): Did you have a conversation with Mr. Ed Daly? A. Yes, I did.

Q. That is the same Mr. Daly that was on the stand here this morning? [282]

A. That is correct.

Q. About when did you have your conversation with Mr. Daly?

A. It was about two weeks before the National Labor Relations Board conducted the vote.

Q. Where was the conversation?

A. In the body shop just opposite his stall.

Q. That is where Mr. Daly works?

A. That is right.

Q. Was there anyone there besides you and Mr. Daly? A. Not at the outset.

(Testimony of Jackson Howell.)

Q. Was there anyone before the conversation was concluded?      A. Yes.

Q. Who was that?      A. Smith.

Q. So during the conversation there were just you, Mr. Daly and later on Mr. Smith?

A. That is right.

Q. Will you now tell us what you said to Daly, what Daly said to you, what you said to Smith, if anything, and what he said to you? Give us the full conversation and who said it.

A. Well, I was passing by and as I frequently do, when Ed is looking, I stopped and talked to him.

Trial Examiner Myers: That is Daly?

The Witness: That is Daly, Ed Daly. I said, "How are you getting along, Ed, and how is the job coming?" et cetera. [283]

And Ed stopped and said, "How about this union thing, and when are we going to get a raise?"

And I said, "Ed, I can't talk to you about it. I can't answer your question because I don't know. You were at the meeting when Mr. Potruch spoke originally, when he said that there could be no cuts in salary, no discharges, no increases. So until the matter is disposed of, I am not in a position to answer your question."

During that conversation, Smith came into the picture.

Q. (By Mr. Nicoson): Do you know at what juncture this Mr. Smith came into the picture?



(Testimony of Jackson Howell.)

A. When Daly asked for the increase, when he asked the question as to when they were going to get the increase.

Q. Mr. Smith testified that he had a conversation with you at about this time and place, and he said in substance that you said to him that if the union came into the plant, there would be a strike. Did you make any such a statement?

A. I did not.

Q. Mr. Smith further testified that at that time and place that you said to him that if the union was voted out, the boys in the body shop would get a 50 per cent commission the first month. Did you say that?

A. I did not. I had no conversation with Smith. My conversation was with Daly; Smith was the spectator.

Daly then brought up the point that the Pontiac dealer down [284] the street had just recently gone to 50 per cent on his metal work for his metal men and for his painters, and he, by God, couldn't understand why we weren't paying it. It was a little difficult to make Ed understand and I rehashed the thing with him again, that we couldn't move in any direction, decreases or increases; and that was the complete text of my discussion when Smith was present.

Q. Now, there has been some testimony here about a meeting that was held in the Mayfair Hotel in Glendale. Is there a Mayfair Hotel in Glendale?

A. There is not.



(Testimony of Jackson Howell.)

Q. There is a Mayfair Supper Club?

A. That is right.

Q. And was that where the meeting was held?

A. That is where the meeting was held.

Q. And do you recall about when the meeting was held?

A. The meeting was held on a Monday evening following the election.

Q. About how long after the election would you say?      A. I think it was three or four days.

Q. And who was present at this meeting?

A. All of the shop employees. I mean by that the body shop, the mechanics, the washers, the lubrication men, the parts department, the used car refinishing department, some of the new car salesmen, some of the used car salesmen; the [285] department heads, including the sales manager and our office manager.

Q. Did you have something to say there that night?      A. Yes, I did.

Q. What did you say?

A. Well, at the conclusion of dinner I told the men that I had some announcements to make to them: That, as they all knew, we had just gone through the election, and as far as I was concerned, I had forgotten about it. I wanted them to forget about it. I hoped that there would be no hard feelings either toward myself or the union, that I harbored no hard feelings toward them.

(Testimony of Jackson Howell.)

I said I hoped further there would be no hard feelings amongst the people in the organization. I said, 'As far as the activity is concerned, I have completely forgotten about it. There will be no discriminations against anybody. I want you people to forget about it.'

I said that I was announcing a change in our flat rate schedule from \$3.00 to \$3.50 an hour; that we were changing the pay of the mechanics on the line and all of the people in the shop, the shop proper, that were on a percentage basis, from 40 to 45 per cent. The metal men to 50 per cent, the painters to 50 per cent. They were getting 50 per cent.

Trial Examiner Myers: Those you raised to 50, were they raised from 40?

The Witness: From 40 to 50. I further announced a [286] \$68 guaranteed work week.

\* \* \*

Q. All right.

A. I recall I closed the meeting with the thought that our business had been interrupted, disturbed; that our livelihood, including theirs, was dependent upon the public, and that I hoped that we could have a good happy organization because only through a happy organization could we give good service and have good public relations.

With that the meeting was adjourned.

Q. Is this the first time you ever had a meeting like this?      A. No, sir.

Q. Have you had them before?      A. Yes.

(Testimony of Jackson Howell.)

Q. Over what period of time?

A. Well, at no stated intervals. We have had meetings around the holidays generally, and some special occasions something would come up, we would have an organization meeting. [287]

Q. There has been some testimony in this record that you have stated that if the shop went union you would close it up. Did you ever make such a statement?

\* \* \*

Trial Examiner Myers: If he wants to put it in that way, that is all right. Now, will the reporter please read the question to the witness?

(Question read.)

The Witness: The answer is that I definitely did not.

Q. (By Mr. Nicoson): Mr. Hansen, a witness here, testified that he had a conversation with you a few days before the election on the wash rack while Mr. Hansen was putting on his boots, at which time you asked Mr. Hansen for the vote in favor of the plant. Did you do that? A. I did not.

Q. Mr. Hansen further testified that he said he would do his best. Did he say that?

A. Not to my knowledge. [288]

Q. Mr. Hansen also testified that at the same time and place you told him that something would be done about a raise in 30 days. Did you say anything like that?

A. I did not. He inquired about a raise, and I



(Testimony of Jackson Howell.)

told him the same story that I had told Ed: That with the situation as it stood, there could be no raises, there could be no decreases, there could be no firing, that he could not have an answer on that until after the election.

Q. Mr. Hansen also testified that at that time and place that you stated to him that you would give him a raise if he would vote against the union. Did you say anything like that? A. I did not.

Q. Mr. Boyce Skelton, a witness for the General Counsel, has testified here that at one time he spoke to you about the union before the election, and probably two or three weeks before, that the conversation took place on the company's ground at the parking lot at which time you said to him that if the union was defeated the boys in the body shop would get a raise. Did you say that?

A. I did not.

Q. Did you say anything like that to him?

A. No, I did not.

Q. Did you have any such conversation with him? [289]

\* \* \*

The Witness: No.

Q. (By Mr. Nicoson): Do you have any knowledge of the layoff of Mr. Claude Leonard?

A. I do.

Q. What is that knowledge?

A. Mr. Bordeau came to me prior to his layoff and explained to me that there wasn't sufficient



(Testimony of Jackson Howell.)

work in the shop to support a separate brake department and a front end and frame straightening department. It was his opinion that the two departments should be consolidated.

Q. Did he so state?           A. He so stated.

Q. Carry on. [290]

A. Herrick had been running the front-end department and the frame-straightening department. Leonard has been working in the brake department. Leonard, in Bordeau's opinion, was not capable of operating the frame straightening machine.

Q. Did he so state?

A. He so stated; and he made the recommendation to me that Leonard be discontinued and Herrick take over the two departments.

Q. Did you have anything to say about that?

A. I agreed with him.

Q. And was that done——

A. Subsequently.

Q. ——if you know?           A. Subsequently.

Q. Now, when did this conversation take place?

A. Well, it was prior to Leonard's dismissal. I don't know the date.

Q. Do you know how long before?

A. It was about three days before his dismissal.

Q. Since Mr. Leonard has been laid off, have you hired any other brakeman to take his place, or do you know——

A. Not to my knowledge.

Q. Did you have conversations with anyone outside of Mr. Daly about raises, requests for raises?

(Testimony of Jackson Howell.)

A. I had a number of men all through that period asking me [291] about raises.

Trial Examiner Myers: During what period?

The Witness: During the period of from the time we were notified early in February and up to the date of the election in June.

Q. (By Mr. Nicoson): What did you answer in response to those requests?

A. My answer in all cases was the same: That we could not commit a violation of the National Labor Relations Act, that we could not do anything to prejudice the union's position, that we could not give any increases, that we could not decrease the wage, that it had to remain status quo, that no one would be fired.

\* \* \*

### Cross-Examination

By Mr. Nutter: [292]

\* \* \*

Q. (By Mr. Nutter): Well, after Mr. Leonard was discharged, who took his place? [294]

\* \* \*

The Witness: No one took his place.

Q. (By Mr. Nutter): Did anyone do his work?

A. Yes.

Q. Who? A. Herrick.

Q. Did anybody assist Mr. Herrick in doing any of Mr. Leonard's work?

A. Not on our payroll.

Q. Well, did anyone assist him?

(Testimony of Jackson Howell.)

A. On occasion.

Q. Who was that?

A. I don't know the man's name.

Q. Did you give Mr. Herrick permission to have another man come in to assist him?

A. I did not.

Q. Who did?

A. Mr. Bordeaux.

\* \* \*

Q. You saw some men wearing union buttons out in the shop, is that right? A. Yes. [295]

Q. And you saw Claude Leonard wearing a union button, did you not? A. Yes, I think so.

Q. Is it your sworn testimony that you did not discuss a pay raise with George Smith on the date that you discussed one with Ed Daly?

A. That is correct. [296]

\* \* \*

### Redirect Examination

By Mr. Nicoson:

Q. Did you see Mr. Herrick wearing a union button? A. Yes, I did.

\* \* \*

## ROWLAND BORDEAU

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [297]

\* \* \*

## Direct Examination

By Mr. Nicoson:

Q. What is your business or occupation, Mr. Bordeaux?

A. I am a service manager at the Howell Chevrolet Company.

Q. Are you sometimes referred to as Chub?

A. Yes, sir.

Q. C-h-u-b, is that correct?

A. Yes, that is a nickname.

Q. How long have you been service manager for Howell Chevrolet?

A. Since the 10th of May, 1949.

Q. As service manager what are your duties?

A. My duties are to run the repair department, supervise the service department and paint shop and trim shop and lube rack and body shop. [298]

Q. What is the body shop?

A. Where is the body shop?

Q. What is it?

A. The body shop is where we repair wrecked automobiles.

Q. Fenders?

A. Repair collisions. That is right, straightening fenders and bodies.



(Testimony of Rowland Bordeaux.)

Q. Fix doors and things of that nature?

A. Yes.

Q. There has been some testimony here about used car mechanics. Do you have anything to do with them? A. No, sir.

Q. I will ask you if on or about February 1 you saw certain of your employees wearing union buttons? A. Yes, sir.

Q. Will you name those that you now recall as having been seen by you wearing buttons as of that date?

A. George Kirkland, Lee Fitzhugh, Claude Leonard, Phil Caballero, Kenny Herrick, Richard Wells.

Q. Is that all that you recall?

A. I believe one body man, but I do not remember his name.

Q. All right. At or about that time did you have anything to say to these employees about their wearing the union button? A. No.

Q. Did you discuss it with them or did they discuss it with [299] you? A. No, sir.

Q. Was the wearing of the union buttons the first time that you were aware that there was any union activity in the plant? A. Yes.

Q. Mr. Leonard has testified here that on one occasion while he was talking with a George Davis in the body shop, that you called to him and told him not to bother the men there, that you did not want any campaigning while on duty. Did any such conversation as that take place? A. Yes.

(Testimony of Rowland Bordeaux.)

Q. Tell us about it.

A. Well, on several occasions I would look out through the service department and see Claude Leonard talking to the body men. There would be one of the men, maybe two of the men. He would be talking to them, especially a new man that came on the job. At that particular time we had quite a turnover in body repairmen; and each time a new man would go on the job in the morning at 8:00 o'clock, it would be about 8:30 and Leonard would be down there talking to him. And I told him I believe about three times that I did not want him talking to the men between 8:00 and 5:00 o'clock.

Q. Now, at the time that you spoke to Mr. Leonard about this subject, was it during working hours?      A. Yes. [300]

Q. Was it at a time when Mr. Leonard was supposed to be working?      A. That is right.

Q. Was Mr. Leonard anywhere close to his place of work?      A. I would judge about 200 feet.

Q. From the place——

A. Where he was supposed to be working.

\* \* \*

Q. Mr. Leonard said that he was laid off on or about March 31, 1950. Is that fact?      A. Yes.

Q. Did you have anything to do with the layoff?

A. Yes.

Q. What did you have to do with it? [301]

A. I was the man that done it.

Q. Did you discuss the matter with Mr. Howell prior to it?      A. Yes.

(Testimony of Rowland Bordeaux.)

Q. What led you to take that particular act?

A. Well, I had very little brake work at that time, and very little frame work and a little front-end work. I didn't have enough for two men to keep two departments going. I decided to put—consolidate the two departments.

And I felt that Herrick was the best man of the two, due to the fact that he was a frame man and a front-end man and Leonard was not. He is also a good brake man.

Q. You had worked with Mr. Herrick, had you?

A. Yes, sir.

Q. And had an opportunity to observe his qualifications in the matter?

A. Yes, sir.

Q. And in the manner he handles his work?

A. Yes, sir.

Q. Did you reach any conclusions as to the relative qualifications of Mr. Herrick and Mr. Leonard with respect to brake work?

A. Mr. Herrick had turned out one or two jobs, complete brake jobs, while Leonard was there, when he was working on another job; and he turned out a much better job than Claude Leonard. [302]

Q. While you were there, did Mr. Leonard work on any front end?

A. No, sir.

Q. Did you ever attempt to get Mr. Leonard to work on front ends?

A. On two occasions.

Q. Did you ask him to do so?

A. Yes, sir.

Q. Did he make a reply?

A. He said that he did not want to do any front-

(Testimony of Rowland Bordeaux.)

end work. He did not know anything about it and he was a brake man.

Q. After that did you ask Mr. Leonard to do any front-end work?      A. No, sir. [303]

\* \* \*

Q. What did you hear Mr. Potruch say while you were there?

A. Well, the few minutes that I was in there, one time that I was in there, he had a sample ballot and he was explaining it to them and showing them how to vote, how to mark the ballot, with an X, and I believe he read a little paragraph of some book of the NLRB, something to that effect. I do not recall it too well.

\* \* \*

Q. Prior to Mr. Leonard's layoff, where did he work?      A. He worked in the back shop.

Q. Did he have a stall?      A. Yes, sir.

Q. And was there any machinery in that store particularly adaptable to brake work?

A. Yes.

Q. What was there?

A. Brake drum turning lathe. [305]

Q. Anything else?      A. No.

Q. After Mr. Leonard was laid off was anything done with that turning lathe?

A. Yes, sir, moved.

Q. Where was it moved to?

A. It was moved out in the front-end department.



(Testimony of Rowland Bordeaux.)

Q. And would that have any relation to where Mr. Herrick had been working? A. Yes.

Q. And what is that relationship?

A. Well, it was moved right alongside of the front-end machine.

Q. That is adjacent to Mr. Herrick's previous location of work? A. Yes, sir.

Q. And why was that done?

A. Well, it was for convenience and also I wanted to get the noise out of the shop. It makes quite a racket when you are turning the drum.

Q. Now, there has been some testimony here about somebody helping Mr. Herrick. Do you know anything about that? A. Yes, sir.

Q. Tell us what you know about that.

A. Well, on a few occasions we have had a job come out of the shop, and before the metal men could finish up with it, [306] the frame had to be straightened, and it would come out at such time when Herrick was busy with brakes, that he would call in this friend of his. I don't know the man's name; we didn't pay the man. I understand from Mr. Herrick that this man owed him some money and still owes him some money.

Mr. Nutter: I object to this testimony.

Mr. Nicoson: I will connect it up later.

Mr. Nutter: I move that it be stricken at this time.

Trial Examiner Myers: Strike out the last.

Q. (By Mr. Nicoson): Were you told anything by Mr. Herrick about this arrangement?

(Testimony of Rowland Bordeaux.)

Mr. Nutter: I object. Mr. Herrick——

Trial Examiner Myers: Overruled. You may answer.

The Witness: I asked Mr. Herrick who this man was he had working for him there, helping him out. And he said it was a friend of his, an old-time mechanic, and he owed him some money. That was the only way he could collect it, to have him come in and help him. The man would work on the frame machines, or he would work on brakes and Herrick would work on the frame machines.

Q. (By Mr. Nicoson): Did that happen often?

A. It happened about four times, I believe, during a period of about three months.

Q. And I believe you stated that Howell did not pay the man's wages? [307]

A. That is right.

Q. Howell Chevrolet Company did not call him to work, is that correct? A. That is correct.

Q. Did any of the employees at Howell ask you about a raise in pay? A. Yes.

Q. Name some of the people that did.

A. Bill Schoene asked me on two different times about a raise.

Q. Now, when did he ask you?

A. Two or three weeks before the election.

Q. And where were you and where was he?

A. Right in his stall where he works in the front part of the shop.

Q. Was there anybody else there besides the two of you? A. No, sir.

(Testimony of Rowland Bordeaux.)

Q. What did you say to him and what did he say to you?

A. He asked me—he said, “What is the chance of getting a little bit more money?” He is on a monthly salary, incidentally.

I said, “Bill, we cannot do anything about this salary deal right now. We have got this thing coming up with the NLRB.” And I says, “Nothing can be done about any salaries at all until after this is over with, and then we will find [308] out from Mr. Potruch what can be done.”

Q. Did Mr. Schoene have any reply to make?

A. He says, “That is OK with me.”

Q. And did you have any conversation with any other of the employees out there with respect to a raise?

A. No, sir.

Q. A Mr. George Smith has testified that on one evening he was in the Playhouse Bar and Grill, or whatever it is, in Glendale, at which time you and Kenny Herrick were present, and that at that time and place you and Mr. Herrick were talking about the union, and that during the course of that conversation you told Mr. Herrick that if the union came into the Howell Chevrolet Company that Mr. Howell would close down the shop.

Was anything like that said?

A. No, sir.

Q. Did you talk with Mr. Herrick about the union?

A. Yes, sir.

Q. What did you say to him and what did he say to you?



(Testimony of Rowland Bordeau.)

A. Well, I was in there first. He came in and sat down beside me, and he said, "Chub, what about this union? What are we going to do about this union deal?"

And I said, "Well, Kenny, there is nothing to do about it but use your head. You do whatever you see fit, whatever you think is best for you." [309]

Q. Was there anything further then in that conversation between you and Mr. Herrick or between you and Mr. Herrick and Mr. Smith or between you and Mr. Smith or anyone else?

A. No, sir; nothing that pertains to this.

Q. At the occasion of one of the second meetings of Mr. Potruch, Mr. Smith testified that you told about working in the shop in San Francisco and that you said that the union would not do the employees any good, that you ran a union shop for about 14 years, and that all you had to do to get the man you wanted was to give the union business agent a fifth of whisky or a \$10.00 bill. Did you say anything like that? A. I did not.

Q. Anything at all like that?

A. No, sir. I told them I ran a union shop for 12 years.

Q. Is it not a fact that at one time you were a member of the Machinists Union?

A. That is right.

Q. Mr. Smith testified here that at the time he left Howell Chevrolet Company that he voluntarily resigned. Do you know anything about his leaving Howell Chevrolet? A. Yes.



(Testimony of Rowland Bordeaux.)

Q. Will you tell us what you know?

A. Well, on numerous occasions I found him on the job drunk in the middle of the afternoon, he and another fellow. And one afternoon I went out there, and they were both drunk. Each [310] had a separate automobile. And I fired them both. And they were so drunk that they were just stupid enough to just hang around.

\* \* \*

Q. Prior to the discharge of Mr. Leonard did you have any conversation with him in relation to the quality of his work?

A. Yes, sir.

Q. When did you first have such a conversation with Mr. Leonard?

A. The first day I went to work for Howell Chevrolet Company.

Q. And did you have such conversations later on?

A. Yes, sir.

Q. About how many would you say you had over a period of time?

A. Oh, I would imagine about 10 or 12.

Q. What was the nature of those conversations?

A. Well, the first one was—he was overhauling brake master cylinders without taking them off the car and that cannot be done properly.

Q. Anything else? [311]

A. And on brake relines he wasn't bleeding the lines all the way out. Consequently, the cars were going out and coming back in in a couple of days with no brake pedal.

(Testimony of Rowland Bordeaux.)

Trial Examiner Myers: Who was this?

A. Mr. Leonard.

Q. When did this occur?

A. On different occasions.

Q. Over what period?

A. Between May and the time he was discharged.

Q. May of—— A. May of '49.

Q. Over a period of almost a year?

A. That is right.

Q. (By Mr. Nicoson): All right. Now, about the time you came there and had these conversations with Mr. Leonard, did you make any change in the assignment of certain types of brake work?

A. Yes, sir.

Q. What did you do about that?

A. I assigned all of the—not all of them, but about 90 to 95 per cent of the brake adjustments went on the lube rack.

Q. When did you start that?

A. About a week after I went to work there in May of 1949.

Q. And did you change that practice, up to the present time? A. No, sir. [312]

Q. Did you also about that time give additional work to the men on the lube rack?

A. Yes, sir.

Q. What type of work did you give?

A. That was replacing mufflers and tail lights.

Q. Now, why did you assign that type of work to the lube rack?

(Testimony of Rowland Bordeaux.)

A. Well, the primary reason for that was that it speeds up the operation. It gets the customer out of there faster; and all the shops that I ever run before—they always done the brake adjustments on the lube rack. A lot of times the customer has only got 20 minutes or so, and he wants his car lubed and his brakes adjusted, and he has to get down here to Los Angeles to work. So when the car is on the rack it is a lot easier to adjust the brakes which only takes five or ten minutes at the most on a car from a 1939 model up. It just speeds up the operation, that is all, and gives the customer a better service. [313]

\* \* \*

Q. At Howell Chevrolet what is the practice, if any, with respect to assignment of work involving stoplight switches?

A. That is done in the electrical department.

Q. By whom? A. By Doyle Christian.

Q. Is he what is commonly termed the tune-up man? A. Yes.

Q. Now, there are two different types of stoplight switches, are there not?

A. Yes, sir. [316]

Q. Both of those types are assigned to Mr. Christian? A. Yes.

Q. Has that been a standard practice since you have been with Howell Chevrolet?

A. Yes. [317]

\* \* \*

(Testimony of Rowland Bordeaux.)

Cross-Examination

By Mr. Nutter:

Q. Mr. Bordeaux, do you have a son that works for Howell Chevrolet? A. Yes, sir.

Q. Where does he work?

A. Lubrication department. [318]

\* \* \*

Q. Now, was this man who assisted Kenny Herrick—was his name Grover Burgett?

A. I don't know if that is his name. I never heard his name.

Q. Did you discuss with Mr. Herrick bringing this man in? [321]

A. After he brought him in.

Q. Well, did Mr. Herrick bring him in without consulting you? A. Yes.

Q. Is it your testimony that the flat rate men out there at the plant have the right to bring in people who assist them without consulting you?

A. No, sir.

Q. How did it happen that Mr. Herrick brought this man in without consulting you?

A. Well, he brought him in and when he was on the job I came over and asked him who the man was.

Q. Who did? A. I did.

Q. You mean Mr. Herrick put this man to work——

A. Well, he hadn't actually started to work yet. He just came there one morning with him.



(Testimony of Rowland Bordeau.)

Q. And when was that?

A. I don't remember what date it was.

Q. How long was that after Claude Leonard was discharged?

A. Oh, I would imagine three weeks probably.

Q. Are you sure about that?

A. No, I am not. I said probably.

Q. And when you first saw this man working on the job, what did you say to Herrick? [322]

A. I asked him who the man was, what was going on.

Q. What did he say?

A. He said he was just an old mechanic who was "an old friend of mine who owes me some money, and I am jammed up here with work, and I have to get this frame straightened, and I am going to let him do the rough straightening on this frame."

Q. Now, is it not a fact that this friend of his actually did the frame straightening and Herrick was doing the brake work?

A. No, in two instances he was doing brake work.

Trial Examiner Myers: Who is "he"?

The Witness: This man that Herrick had brought in.

Q. (By Mr. Nutter): Well, is there any reason, since these men were on a flat percentage basis, that Claude Leonard could not do the brake work if the company was overloaded?

A. Claude Leonard wasn't there.

(Testimony of Rowland Bordeaux.)

Q. Well, is there any reason why you could not have retained him if this man was rushed instead of bringing in somebody from the outside?

A. Well, Kenny wanted this man as a means to get the money out of him that he owed him—to get him to help him out.

Q. And is it your sworn testimony that this individual only worked for Herrick to pay off his debts?

A. That is right. [323]

\* \* \*

Q. Is this man still assisting Herrick out there occasionally?

A. No, sir.

Q. When was the last time he was out [325] there?

A. I do not remember that. I couldn't recall.

Q. And how many times did you see him out there?

A. About four times, four or five times.

Q. Now, when was the first time?

A. About three weeks after Leonard was laid off.

Q. And when was the second time?

A. That is as close as I can remember.

Q. And when was the second time?

A. Oh, probably about two or three days right in a row, and then maybe a week or two weeks elapsed, and he worked another day. It was always for one day at a time or a day and a half or something like that.

(Testimony of Rowland Bordeau.)

Q. And then a few days later he worked another day. Then again. Is that right?

A. That is right. [326]

\* \* \*

Q. Now, is there any reason why you did not ask Claude Leonard to come back and help Mr. Herrick when he was overworked?

A. No, sir.

Q. You had no reason? A. No, sir.

Q. Was Mr. Leonard discharged or laid off for lack of work? A. Who?

Q. Mr. Leonard. [327]

A. He was discharged.

Q. He was discharged for what reason?

A. Well, I just got through telling.

Q. I am asking you now. For what reason did you discharge him?

A. Because he couldn't do frame and front end work, and I didn't have enough for a frame and front end man and a brake man.

\* \* \*

Q. Well, why did you terminate his employment?

A. Because he wasn't a frame and front end man.

Q. Well, was there a lack of work in the brake section? A. Yes, they were slow.

Q. You testified that this man who assisted Herrick, who came in, worked on brakes, too? Is that right?

(Testimony of Rowland Bordeaux.)

A. Yes, I believe he done part of one job.

Q. Is there any reason why you could not call in Mr. Leonard to do that brake work?

A. No, I guess there wasn't; but I didn't know where to get ahold of him. I didn't know that Kenny Herrick was going to feel that he needed the help.

Q. Well, do you not know that Kenny Herrick's wages have increased a great deal since Claude Leonard left there? [328]

A. Yes.

Q. They are almost double now, are they?

A. Not now they aren't.

Q. But up till recently?

A. Yes, we had a busy season.

Q. In other words, he had double the work, the front end and alignment work, and the brake work?

A. That is right.

Q. That just about doubled his commission work?

A. Well, not quite.

Q. Almost, though?

A. Yes.

\* \* \*

Q. (By Mr. Nutter): When did Mr. Herrick go to work for Howell Chevrolet?

A. Within the latter part of 1949.

Q. Would it refresh your memory if I told you it was December of 1949?

A. That could be just about the time.

Q. Now, you previously testified——

Trial Examiner Myers: Is that right, Mr. Nicolson, what [329] he said was the date?



(Testimony of Rowland Bordeaux.)

Mr. Nicoson: That is approximately correct.

Mr. Potruch: Approximately.

\* \* \*

Q. Well, is it your testimony that Mr. Leonard was discharged because of defective workmanship?

A. No. [330]

Trial Examiner Myers: When you say "defective," you mean inefficient?

Mr. Nutter: Inefficient.

Trial Examiner Myers: Is that what you mean, Mr. Witness?

The Witness: Yes, sir.

Q. (By Mr. Nutter): Now, you testified that on two occasions you asked Mr. Leonard to do front end work. What were those two occasions?

A. I do not know when they were, but they were sometime between the time of the 10th of May and before Herrick came to work there. There was a period of about a month or so I didn't have a front end man at all.

Q. Well, can you tell me what season it was—spring, summer, fall, winter, or when?

A. Well, it would have had to have been winter-time.

Q. And about what month?

A. I don't know, sir.

Q. Now, tell me the conversation.

A. Well, we had a couple of front end jobs to do. I asked him if he would do them and he said no.

Q. Well, what did you say to him?

(Testimony of Rowland Bordeaux.)

A. I asked him if he would do a front end job for me.

Q. And what did he say?

A. He said, "No." He said, "I am not a front end man. I am [331] a brake man."

Q. He just came right out and said, "I am a brake man"? Is that right? A. That is right.

Q. Now, would you say this—

Trial Examiner Myers: Is it your testimony that Leonard never did any front end work while he was employed by you?

The Witness: Yes, sir.

Trial Examiner Myers: None at all?

The Witness: None at all.

Q. (By Mr. Nutter): Now, when was this other occasion? When did that take place?

A. Oh, a little while after that. I don't recall if it was one day or one month. It was sometime after that.

Q. Was this in the fall of 1949?

A. I don't remember.

Q. Was it the summer of 1949?

A. I don't remember.

Q. Well, actually you don't remember at all, do you?

A. I don't remember those dates when I asked him to do those front end jobs, no.

Q. Well, can you place it at all? A. No.

Trial Examiner Myers: Was Leonard working on any other [332] job at the time you asked him to do the front end job?

(Testimony of Rowland Bordeau.)

The Witness: I couldn't answer that because I don't recall that.

Trial Examiner Myers: Who assigns Leonard his work? You and you alone?

The Witness: Myself and the service salesman, Ed Anthony, are the only two.

Q. (By Mr. Nutter): Are there any other occasions when you asked Leonard to do front-end work? A. I don't think so after that.

Q. At the time of the discharge, did Leonard say anything about front end work? A. Yes.

Q. On March 31? A. Yes.

Q. What did he say?

A. He said, "How about letting me do that job?"

I said, "I don't think you are a front end man. You told me one or twice you were not a front end man."

Q. You told him that at the time of the discharge? A. Yes. [333]

\* \* \*

## FREDERICK A. POTRUCH

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

\* \* \*

## Direct Examination

By Mr. Nicoson:

Q. What is your business or occupation?

A. I am an attorney.

Q. A member of any law firm?

A. I am a member of the firm of Carter & Potruch. [340]

\* \* \*

Q. In your capacity as an attorney have you ever been employed by the Howell Chevrolet Company? A. That is right. I have and still am.

Q. There is some testimony in the record, Mr. Potruch, about a Mr. Potruch that made some talks to the employees at Howell Chevrolet. Are you the same Mr. Potruch? A. I am.

Q. Do you know when the first of those talks was made?

A. I place the first talk sometime in the latter part of May, maybe the early part of April, sometime in there. I may be wrong by a week or so, but it is around in there.

Q. Of what year? A. 1950.

Trial Examiner Myers: Did you say the latter part of May or the first part of April?



(Testimony of Frederick A. Potruch.)

The Witness: Yes, it is either the last part of May or the first week of April. I can't fix the exact date. I am [341] sorry—I meant March. I am sorry. March.

Trial Examiner Myers: March?

The Witness: March.

Q. (By Mr. Nicoson): The latter part of March or the first part of April; is that your testimony?

A. Yes.

Q. Who were present at the time you were making this first of your talks?

A. Well, Mr. Howell and the employees of the shop. I believe they consisted of the parts men, the mechanics, the body men, painters, lube men, tune-up men. I don't know if I said painters and body men—also the cycle-tow boy. I think he was there.

But at least that is who I asked to have present. I don't know if all of those came in, but that is the request I made of Mr. Howell, to have those all present; and whether they were there—all of those branches—or not, I do not know.

Q. And as far as you know, they were employees of the Howell Chevrolet Company?

A. As far as I know they were employees of the Howell Chevrolet Company. [342]

\* \* \*

Q. Tell us how the meeting was conducted.

A. The meeting was begun by Mr. Howell introducing me to the employees and telling them that I was representing a firm that was representing

(Testimony of Frederick A. Potruch.)

them in a matter that was pending before the National Labor Relations Board.

Q. Did you have some remarks to make to those men?      A. I sure did.

Q. What did you say to them?

A. Well, I told them—I said they were pretty aware—first, I started out in a jesting vein, that undoubtedly the union has told them about my coming up and talking to them, and told them that probably the company would send up somebody from Carter & Potruch, namely, Potruch, to talk to them. And we smiled about that, and then I went on with the serious angle of this meeting which went in a vein as follows:

I told them that I felt it was no more than right for the company to state to them what their policy would be toward this whole matter, and I said I intended to tell them what that policy was. And I proceeded to tell the men what that policy was.

I told them that the company would test the jurisdiction of the National Labor Relations Board. I told them that it had been done on other occasions; that they were probably aware of that and had been told so by the union. And I told them that in my opinion an automobile dealer was no more than [343] a local merchant—local merchant of Glendale, as I put it—who bought his cars in the State of California and sold his cars in the State of California; and that in my opinion and from my knowledge of the law that I didn't think

(Testimony of Frederick A. Potruch.)

that the National Labor Relations Board could have any jurisdiction over the matter; that I felt that if there was anything to be done by the company and the union that they were big enough to do it themselves without having anyone step in and tell them what to do and what not to do as put in any act, and I happened to name the act, the Taft-Hartley Act. I didn't use any other name because I felt the men might be more familiar with the term "Taft-Hartley Act" in talking about labor relations acts, et cetera.

After I presented that to them I went into the ramifications of how the jurisdiction of the Board could be decided. I told them that this was a representation proceeding, that the union was asking that they represent the men to bargain collectively, and that it was at these proceedings that we would deny the jurisdiction of the Board; that there would be a formal hearing, that we would have to run through the gamut of a formal hearing; and I told them that we would still stick to our guns on the question of jurisdiction at all times, just as we have done in these proceedings.

And I told them that the only way we could get an adequate test of the question of jurisdiction, if it was to [344] go that far, would be to go into the Circuit Court of Appeals as had been done in the Townsend case; and then I went into the ramifications of getting it into the Circuit Court of Appeals, explaining to them how that had to be done, what



(Testimony of Frederick A. Potruch.)

the legal mechanics, the legal procedures, would be.

I said that it might even—I didn't say it would, but it might even necessitate—that for any company, not necessarily Howell, to get a case into the United States Circuit Court of Appeals, it might be necessary to do something to be cited for an unfair act under the National Labor Relations Act, that someone might have to be discharged, either on a friendly basis or even deliberately, and then the charge brought. It didn't have to be Howell; it could be somebody else. I only used that as an example.

And then they would have a hearing on it, as we are now having, and I explained that legally. And that after a ruling was handed down, if it was unfavorable, then the company would have the right to appeal to the United States Circuit Court of Appeals; if the Trial Examiner was to rule against the company, and then the Board in Washington ruled against us on jurisdiction, that we would have to take certain procedures to appeal to the Circuit Court of Appeals.

I even went so far as to tell them that it was even possible to go to the United States Supreme Court from the Circuit Court of Appeals. [345]

I wasn't trying to confuse the men, but it was a complicated procedure. If I mentioned the word "certiorari," it was just in the course of speaking. I was trying to avoid any——

Mr. Nutter: Mr. Examiner, I object to what he was trying to avoid.



(Testimony of Frederick A. Potruch.)

Trial Examiner Myers: Just tell us what you said there.

The Witness: I told them it was possible to get a case up to the Supreme Court with the proper set of facts, to get it up there and have the highest Court in the land test the question of jurisdiction.

I also told them that it was possible for a company—that during this period in which there was either a friendly unfair labor charge or an unfair labor act or even a deliberate one—that it is possible to have what is known as an unfair labor strike, and they could go out.

I said to them I didn't know whether they would do it here; I was not concerned about it at all.

I told them that there were other types of strikes to show them the difference. I said to them that there was an organization strike. I even pointed out to them that up to the present time there was no such thing. I showed them what that meant. I told them that if there was an organizational strike the men would be on the line picketing the place to have the union represented. And I told them about an economic [346] strike, what that meant.

And I also told them what the boss would have to do, what the employer would have to do, in the form of replacing men and rehiring in case the strike was on—even on an unfair labor strike. They might have to take the men back. It was entirely possible that the Board would order them to take the men back.

(Testimony of Frederick A. Potruch.)

After that I told them that I did not know how long this would take, whether it would take a month, two months or how long. I said that would depend upon the procedures and how fast we could have hearings, et cetera, how fast the Board would move, how fast we could possibly move under the circumstances; and I told them that during this whole period of time I wanted them to know that I had instructed Mr. Howell—and I was telling them now—that there could not be any increases in wages nor any decreases in wages nor any change in their working conditions. And I said that I had given those instructions to Mr. Howell, and that I would attempt to see that he lived up to them—and I have.

Mr. Nutter: I object to that, Mr. Examiner. I move it be stricken.

Trial Examiner Myers: What?

Mr. Nutter: "I have."

The Witness: I am sorry. I said, "I have."

Trial Examiner Myers: Well, strike it out—if you said [347] that.

The Witness: What I said was that I have up to that point. That is, I am only talking about up to that point. I couldn't talk about the future.

Trial Examiner Myers: Just tell us what you said.

The Witness: Then from that point on, after explaining that there would be no increases or decreases or changes in the working conditions—and

(Testimony of Frederick A. Potruch.)

I also told them that no men could be discharged except for economic reasons or for cause.

Q. (By Mr. Nicoson): Did you say why?

A. I beg your pardon?

Q. Did you say why?

A. I said why, that the Taft-Hartley Act—I tried to couch it so that they could understand it—that the Taft-Hartley Act did not permit an employer to do it; it might be prejudicial to them; it might influence them, might prejudice them to cast their vote for or against—and also that the union could not do that.

And I also told the men that if they did to please notify me. And from there I went on to the subject of treatment of employees. In other words, I pointed out to them—and I was very careful to point out to them that this was my own personal opinion and not the opinion of management—that if I was an employee that I would go to the employer, state my problems to him and see what I could work out with him; and if the [348] employer, to quote, was “a son-of-a-bitch,” and wouldn’t do anything for me I would go out and hang him—to which there was a lot of laughing and everybody looked at Mr. Howell.

I said it wouldn’t be until I first went to the boss myself and had a talk with him—that I would not have gone out and paid anybody to go in and represent me until I had first had the opportunity of doing my own talking.



(Testimony of Frederick A. Potruch.)

And I also told the men right at that point that it had gone too far for any of the men to do that; that they had selected voluntarily somebody to represent them and that person would do all their talking for them at any time they wanted to.

I also told the men that the union—that we had no grievances against the union, we had no grievances at all against them, that Mr. Howell had none against them, that it was their right to join a union or not, join a union as they saw fit, and we would do nothing to discourage them. I even pointed out the example that it was a right to join the union just as much as it was my right to join the Elks or any organization.

I also pointed out to them that while it was their right to do so, it was also our right under the Act to test the Board's jurisdiction.

That in essence was the first meeting. [349]

\* \* \*

Q. Now, with respect to the first meeting, when did the second meetings take place

A. I place the second meetings—the second meetings were a series of meetings, a group of meetings—oh, sometime just prior to the election, maybe two weeks prior thereto, possibly ten days prior thereto.

Q. At the time you had these meetings, had the election been set by the Regional Board—if you know?

A. The decision had come down from the Board.



(Testimony of Frederick A. Potruch.)

Q. Did you have any documents with you?

A. I did.

Q. What documents did you have?

A. I had a sample ballot sent to me by the National Labor Relations Board; and I also had a decision of the National Labor Relations Board in Washington.

Q. All right. What did you say to the employees on those occasions?

A. Well, prior to speaking to the employees I spoke to Mr. Howell or Mr. Bordeau—Mr. Howell was out of town, I believe, or not in—and I told them that I would like to tell the men—wait a minute, let me correct myself. I am not so sure Mr. Howell was out of town or not.

Well, anyway, I did speak to Mr. Howell or Mr. Bordeau [350] and said that I had promised the men at the first meeting that I would keep them informed if they had not been informed by the union of the result of our test, and that I would tell them what the decision was; and that was the purpose of calling these men together, to tell them what the decision of the Board was, and also to tell them what the sample ballot was, and then have it posted on the door for them to read.

Meetings were called. At that time Mr. Bordeau suggested to me that we have group meetings rather than all at one time. I suggested all at one time, and Mr. Bordeau said no, he preferred not to because he didn't want to disrupt the place. He was busy and wanted to go on with his work. It made

(Testimony of Frederick A. Potruch.)

a lot of sense to me. And he wanted to bring them in in groups. And I told him to bring them in as convenient—used car men, parts department, et cetera.

Those groups ranged from anywhere—to correct Mr. Bordeau, for he wasn't there at all times—from four to ten men. I do not think there were more than ten men on any one time. And I would say there were five such group meetings. It is possible there were six or four—there were several group meetings.

Q. Tell was what you said.

A. Nobody introduced me to the men. I didn't think it was necessary for me to be introduced because I had already spoken to them before. [351]

First thing I told them was that the National Labor Relations Board had handed down a decision, and I told them what that decision was: That they had found that the Howell Chevrolet Company either was engaged or affected commerce and therefore came under their jurisdiction, and that they had ordered an election.

And then I unfolded the ballot and held it up before them and said, "This is a sample of the ballot."

And then I took the ballot and read portions of it. I read practically, I would say, 90 per cent of the ballot. I even told them the time of the election, the place of the election. There would be a secret ballot. There would be a member of the Board present to conduct such an election.

(Testimony of Frederick A. Potruch.)

I also told them that it was important that they mark their ballots clearly with an X, either for the union or against, not with a check or anything else. It was entirely possible for the Board agent to say that it was not clearly marked and throw the ballot out, and they would lose their ballot as a [352] result.

\* \* \*

Q. (By Mr. Nicoson): Mr. Potruch, George Smith, a witness for the General Counsel, testified that in one of your talks you stated that there would be a new deal after the first of the month. Did you say that or anything like that?

A. I didn't say anything like that, or even close to that.

Q. He further stated that at that same time and place you further stated that you could not say what the new deal would be at that particular time. Did you say that or anything like that?

A. I didn't say that or anything like it or close to it.

Q. Mr. George Kirkland, a witness for the General Counsel, during his testimony testified that in one of your speeches you said that the union would never get a contract out of Howell. Did you say that or anything like that?

A. I did not say that.

Q. Mr. Fitzhugh, a witness for the General Counsel, testified [357] that during your speech or your talk you said that the union would not get a



(Testimony of Frederick A. Potruch.)

contract even if they won the election. Did you say that or anything like that?

A. I did not say anything—I did not say that or anything like that. I did say, however, that—in explaining what an unfair labor charge would be—that one of the ways in which to bring the case up to the Board to test a question on jurisdiction would be by the commission of an unfair labor act. [358]

\* \* \*

### DOYLE CHRISTIAN

a witness recalled by and on behalf of the respondent, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Nicoson:

Q. You are the same Mr. Doyle Christian that appeared and testified previously in this hearing, are you not?      A. I am.

Q. What is your business or occupation?

A. Engine tune-up or electrical mechanic.

Q. By whom are you employed?

A. Howell Chevrolet.

\* \* \*

Q. (By Mr. Nicoson): —if during that period of time you have ever been asked to do the work on stoplight switches?      A. Yes.

Q. Has that been periodical or over that entire period of time? [359]      A. The entire period.



(Testimony of Doyle Christian.)

Q. Do you know of any instances out there in the two years that you have been working there that the repairing of stoplight switches or any work on stoplight switches was assigned to anyone but you? A. No.

Q. Do you do the stoplight switch work on both types of stoplight switches? A. Yes. [360]

\* \* \*

Q. (By Mr. Nicoson): Now, during the two years or more that you have been there, do you know of any occasion when the stoplight switch work was assigned to the brake man?

A. Never. [361]

\* \* \*

Q. Have you had occasion to observe whether or not types of brake work are being done on the lube rack at the Howell Chevrolet?

A. Yes, the minor brake adjustments.

Q. And for what period of time has that been going on, if you know?

A. I know that it has been going on since Mr. Bordeau came in as service manager.

Q. Has Mr. Bordeau ever talked with you about the union? A. No, sir.

Q. Has Mr. Howell talked with you about the union? A. No.

Q. Have any other of the members of management out there discussed the union with you?

A. No. [362]

\* \* \*

## KENNETH HERRICK

a witness called by and on behalf of respondent, being first duly sworn, was examined and testified as follows:

\* \* \*

## Direct Examination

By Mr. Nicoson:

Q. Mr. Herrick, what is your business or [365] occupation? A. Wheel alignment and brakes.

Q. By whom are you employed?

A. Howell Chevrolet.

Q. And how long have you been employed by Howell Chevrolet?

A. This time, the last time, since last November, about 11 months.

Q. November of 1949? A. '49.

Q. Had you worked for the Howell Chevrolet Company on a previous occasion?

A. I had. I left in 1948—no, it was in '47.

Q. 1947? A. Yes.

Q. How long had you worked for them at that stretch?

A. Approximately a little over two years.

Q. And you left there on your own volition?

A. Right.

Q. And returned November of 1949?

A. 1949.

Q. Upon your return to work at Howell Chevrolet in November of 1949, what duties were assigned to you?

(Testimony of Kenneth Herrick.)

A. Wheel alignment and frame [366] straightening.

\* \* \*

Q. Now, do you have a machine out there that is used for the purpose of straightening frames?

A. Definitely. We do.

Q. Is that a complicated operation?

A. It sometimes is—the use of it.

Q. And requires some heavy work?

A. Right.

Q. You operate that?           A. Yes, sir.

Q. And you operated those types of machines before you came back to Howell in November?

A. Yes, sir.

Q. Prior to coming back to Howell in November, 1949, had you also done front end work?

A. Yes, I had.

Q. Had you in your other employment done any work on brakes?           A. I had.

Q. How long have you been engaged in working on front ends and brakes?

A. Approximately 10 years or maybe a little longer.

Q. Do you know Claude Leonard?

A. Yes.

Q. Did you work in the same shop that he did? [367]           A. Yes.

Q. Were you working there in March of 1950?

A. Yes.

Q. When Mr. Leonard left?           A. Yes.

(Testimony of Kenneth Herrick.)

Q. After Mr. Leonard left, was there any change made in your duties or assignments?

A. I was assigned the brakes along with my wheel alignment jobs.

Q. Was there any equipment added to your position there?

A. Equipment? We had the equipment. There were a few little changes made, transfers, but——

Q. What were those changes?

A. Well, the brake drum lathe was transferred from the inside shop out to where my department is, on the side.

Q. And after that change, who operated that brake drum lathe?      A. I did.

Q. Who operated the front end machine?

A. I.

Q. Who operated the frame straightening machine?

A. I. Only on one occasion I had a fellow come in to help me.

Q. Oh, yes, tell us all about that.

A. He owed me a little money. Oh, maybe two days he was out there. I think two different occasions I had him, and that [368] was definitely up to my personal self. I paid him out of my pocket and everything else. Howell did not have anything to do with that part of it. He used his own tools, what tools he had. On the frame straightening you do not need too many tools outside of what goes on it. [369]



(Testimony of Kenneth Herrick.)

Q. Could you tell us whether or not there has been anybody employed as a brake man at the Howell Chevrolet since Mr. Leonard has left?

A. Definitely not. [370]

\* \* \*

Q. Mr. George Smith has testified that on occasions in the Playhouse Bar, at which you were present, Mr. Bordeau was present and Mr. Smith was present, that Mr. Bordeau said to you that if the union organized the Howell shop, that Mr. Howell would close it down. Did any such conversation ever take place?

A. I do not believe it did. [371]

\* \* \*

Q. Oh, Mr. Herrick, you attended a union meeting sometime in the latter part of January, 1950, did you not?

A. January, 1950?

Q. Yes. A. I did attend a meeting.

Q. And you signed a card? A. Yes.

Q. And the next day you showed up wearing a union button?

A. Well, I had a button. I don't remember whether I got it that night or not.

Q. Well, within a very few days after the signing of the card? A. Yes.

Q. You had a button? A. Yes.

Q. And you wore it in the shop? A. Yes.

Q. Was there ever anything said about the wearing of that button? A. Nothing said. [373]

\* \* \*

(Testimony of Kenneth Herrick.)

Cross-Examination

By Mr. Nutter:

Q. Do you recall telling me that Mr. Burgett worked chiefly on frame straightening, is that right? A. Right.

Q. Is that his name—Burgett? [375]

A. Burgett.

Trial Examiner Myers: How do you spell his name?

The Witness: B-u-r-g-e-t-t.

Q. (By Mr. Nutter): And do you recall telling me that while he was working on frame straightening you were working on brake jobs?

A. Right.

Trial Examiner Myers: Is that so?

The Witness: Yes—brakes and front ends. [376]

\* \* \*

JOSEPH F. PRICE

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Nicoson:

Q. Mr. Price, what is your business or occupation? A. I am a mechanic, I guess.

Q. What kind of a mechanic, sir?

A. Automobile.

(Testimony of Joseph F. Price.)

Q. By whom are you employed?

A. Howell Chevrolet. [385]

\* \* \*

Q. Did any union activity among the employees come to your attention while you were employed there?

A. Oh, yes. I heard quite a bit about it. [386]

\* \* \*

Q. Did any of your supervisors or officers of the company talk with you about any of that literature?

A. No, sir.

Q. Did any of them during that period of time ask you if you were going to join or had joined the union?

A. No, sir.

Q. After you signed that card did you wear a union button in the plant?

A. I did.

Q. Did any of them ask you about the union after that?

A. No, sir.

Q. Mr. Bordeau didn't?

A. No, sir.

Q. Did Mr. Howell?

A. No, sir.

Q. Did any other person out there connected with management ask you anything at all about it?

A. They did not.

Q. Did you and Kenny Herrick talk to Mr. Bordeau about it?

A. Well, we started to but we didn't get very far.

Q. What did you say to him and what did he say to you?

(Testimony of Joseph F. Price.)

A. He just told us that if we wanted to vote for a union to go ahead, that was our business.

Q. Did you see Claude Leonard wear a button around there? A. I did. [388]

Q. George Kirkland? A. Yes.

Q. And Lee Fitzhugh?

A. Yes, sir. [389]

\* \* \*

Q. Do you know whether or not the Howell Company has ever employed anybody to take Mr. Leonard's place on the brake job?

A. Have they ever employed anybody?

Q. Yes.

A. Not unless it was Kenny; they haven't other than that. [390]

\* \* \*

### PHILIP CABALLERO

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

\* \* \*

#### Direct Examination

By Mr. Nicoson:

Q. What is your business or occupation, Mr. Caballero? A. I am an automobile painter.

Q. By whom are you employed?

A. Pardon me?

Q. By whom are you employed?

A. Howell Chevrolet Company.



(Testimony of Philip Caballero.)

Q. How long have you been there?

A. Approximately three and a half years. [391]

Q. There has been some testimony about union activity among the employees at Howell Chevrolet. Do you know anything about that?

A. I heard.

Q. When did it first come to your attention?

A. I suppose it was around January or so.

Trial Examiner Myers: This year?

The Witness: This year.

Q. (By Mr. Nicoson): Any particular part of January?

A. I couldn't say offhand.

Q. How did it come to your attention?

A. Through some of the employees in the shop.

Q. Anyone that you now recall?

A. Mr. Leonard.

Trial Examiner Myers: Claud Leonard?

The Witness: Claud Leonard, yes.

Q. (By Mr. Nicoson): Anyone else?

A. George Kirkland, yes.

Q. Did you sign a card? A. Yes, I did.

Q. After you signed the card did you wear a union button? A. I did.

Q. While at work? A. Yes, sir.

Q. Did Mr. Bordeau or Mr. Howell or any of the others from [392] management talk to you about not to join the union or wear the union button or anything like that? A. No, sir.

Q. Nothing else was said? A. No, sir.

\* \* \*

(Testimony of Philip Caballero.)

Q. (By Mr. Nicoson): Did Mr. Howell say anything to you about the union or your wearing of a button or anything about your activities?

A. No, sir, he did not.

Q. Did Mr. Bordeau say anything like that to you?      A. He did not.

Q. Did any of the others from management say voted one way or the other?      A. No, sir.

Q. Did anybody promise you an increase if you anything to that effect?      A. No, sir.

Q. Was anything said about an increase by any of the people from management?

A. Not at that time. [393]

Q. You say "not at that time." Did somebody say something about an increase at a later date?

A. After the banquet at the Mayfair.

Q. After the banquet at the Mayfair?

A. Yes, sir.

Q. That took place after the National Labor Relations Board held an election out there?

A. That's right. [394]

\* \* \*

RICHARD A. WELLS

a witness called by and on behalf of the Employer,  
being first duly sworn, was examined and testified  
as follows:

\* \* \*

Direct Examination

By Mr. Nicoson:

Q. What is your business or occupation?

A. Car washer and polisher.

Q. By whom are you employed?

A. Howell Chevrolet.

Q. How long have you worked for Howell  
Chevrolet?

A. Twenty-three months and three days. [396]

Q. Were you employed there around the first of  
the year? A. Yes, I was.

Q. Did you become aware of any union activity  
around that period of time? A. Yes, I did.

Q. How did you become aware of it?

A. Well, by Mr. Leonard and George Kirkland.

\* \* \*

Q. You didn't wear a union button. After you  
signed that card did Mr. Howell speak to you about  
the union in any manner?

A. No, he didn't.

Q. Did Mr. Bordeaux? A. No.

Q. Is Mr. Bordeaux your supervisor, your boss?

A. That's right.

Q. Did anyone else from the management of  
Howell Chevrolet [397] talk with you about the  
union in any manner? A. Not anyone.

(Testimony of Richard A. Wells.)

Q. Isn't it a fact that Mr. Howell came up to you before the election and asked you if you would vote in favor of the company? A. No. [405]

Q. Who is your supervisor when you polish and wash cars? A. Mr. Bordeau.

Q. Mr. Bordeau? A. Yes.

Q. Isn't it a fact that Mr. Bordeau said something to you about wearing a union button?

A. No.

Q. So you didn't wear one?

A. No, he never said anything to me about a union button. [406]

\* \* \*

### GEORGE GREEN

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Nicoson:

Q. What is your business or occupation?

A. Radio repair, sir.

Q. By whom are you employed? [412]

A. Howell Chevrolet?

Q. How long have you been employed there?

A. Oh, about nine or ten months.

Q. Do you recall about when you came there?

A. Oh, it was either February or March.

Q. Of 1950? A. Yes.

Q. Did you learn during your course of employ-



(Testimony of George Green.)

ment out there about any union activity being conducted among the employees?      A. Yes, sir.

Q. How did you learn that?

A. Well, the first day I was there I was approached by Barnum and Leonard.

\* \* \*

Q. (By Mr. Nicoson): After being approached by Mr. Barnum and Mr. Leonard, were you talked to by Mr. Howell about the union in any form or manner?      A. No, sir.

Q. Were you talked to by Mr. Howell in any form or manner prior to the time either Mr. Barnum or Mr. Leonard talked to you?

A. No, sir. [413]

Q. Were you talked to about the union by Mr. Bordeau in any shape or form at any time?

A. No.

Q. Were you talked to about the union in any shape or form by any of the officers of the Howell Chevrolet Company?      A. No.

Q. Did Mr. Howell say anything to you about any raises?      A. No, sir.

Q. Did Mr. Howell say that you would get a raise if you voted any particular way in the election?      A. No.

Q. Did Mr. Bordeau talk to you about any raises?      A. No, sir.

Q. Did Mr. Bordeau tell you that you would get a raise if you voted any particular way in the election?      A. No, sir. [414]

\* \* \*

## JOSEPH SCIOLORO

a witness called by and on behalf of the Employer, being first duly sworn, was examined and testified as follows:

\* \* \*

## Direct Examination

By Mr. Nicoson:

Q. Mr. Scioloro, what is your business or occupation?      A. Used car mechanic.

Q. By whom are you employed?

A. Mr. Howell.

Q. Howell Chevrolet Company?

A. That's right.

Q. How long have you been so employed?

A. Right around eleven months, I guess.

Q. While you were employed by Howell Chevrolet Company, did you sign a union card? [415]

A. I did.

Q. Either before or after signing the card did Mr. Howell say anything to you about the union?

A. No, he didn't.

Q. Did Mr. Bordeau say anything to you about the union?      A. No, sir.

Q. Who is your boss over there?

A. Right now Bob Roberts, I suppose.

Q. Was Mr. Roberts there in January, February and March, 1950?      A. Yes.

Q. Did he say anything to you about the union in any way, shape or form?      A. No, sir.

Q. Did Mr. Howell promise you a raise if you voted one way in the election?      A. No, sir.

(Testimony of Joseph Scioloro.)

Q. Did Mr. Bordeau make such a promise?

A. No, sir.

Q. Did Mr. Roberts make such a promise?

A. No, sir.

Q. Was anything said to you by Mr. Howell about a wage increase prior to the election?

A. No, sir.

Q. Was anything said to you about a wage increase by Mr. Bordeau prior to the election? [416]

A. No, sir.

Q. Or by Mr. Roberts?

A. No, sir, nobody said anything. [417]

\* \* \*

### ROBERT E. REEVE

a witness called by and on behalf of the Employer,  
being first duly sworn, was examined and testified  
as follows:

\* \* \*

### Direct Examination

By Mr. Nicoson:

Q. Mr. Reeve, what is your business or occupation?      A. Automobile lubrication.

Q. By whom are you employed?

A. Howell Chevrolet.

Q. How long have you been employed by Howell Chevrolet?

A. Approximately a year and a half.

(Testimony of Robert E. Reeve.)

Q. Were you employed there at the time Mr. Bordeau came on as the service manager? [418]

A. Yes, sir.

Q. And had you been employed prior to that time?

A. Yes.

Q. During your tenure with the Howell Chevrolet Company, have you done any brake adjustments?

A. Yes, sir.

Q. On the lube rack?

A. Yes, sir.

Q. How long have you been doing that?

A. I would say almost the entire length of my service there.

Q. Were you doing that type of work before Mr. Bordeau came?

A. Yes, sir.

Q. And you continued to do it after he came, is that correct?

A. Yes, sir. [419]

\* \* \*

Q. Three or four months. While you were employed at Howell Chevrolet did Mr. Howell ever speak to you about the union in any shape or form?

A. No, sir.

Q. Did he ask you any questions about it?

A. No, sir.

Q. Did you have any discussions with him about it?

A. No, sir.

Q. Did Mr. Chub Bordeau ever ask you anything about the union?

A. No, sir.

Q. Did you ever have any discussions with Mr. Bordeau about the union?

A. No, sir.

Q. Or did he ever have any with you?

A. No, sir. [420]



(Testimony of Robert E. Reeve.)

Q. Did any other member of the management out there ever have any discussions with you about the union in any shape or form?

A. None whatsoever.

Q. Did Mr. Howell promise you an increase if you voted any particular way in the union?

A. No, sir.

Q. Did Mr. Bordeau make such a promise to you?      A. No, sir.

Q. Did anyone else in the management make any promises to you about voting in the union?

A. None whatsoever.

Q. Did anyone tell you that you might be fired if you voted any particular way?

A. No, sir, never. [421]

\* \* \*

### CLAUD LEONARD

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Nutter:

\* \* \*

Q. Mr. Leonard, I will ask you if you gave a union authorization card to Mr. Richard Wells during the month of February, 1950?

A. I did.

Q. When was that? Will you tell us the circumstances?

(Testimony of Claud Leonard.)

A. Well, it was the 7th or 8th of February, I believe. He said he would take it over and have Paschal sign it. That's [425] the last I saw of the card until after it was signed. [426]

\* \* \*

Q. (By Mr. Nutter): Mr. Leonard, Mr. Bordeaux, a witness called by the Respondent, testified that on two occasions during the year 1949 you refused to do front end work while working at Howell Chevrolet Company. Will you tell us [431] about that?

A. I recall one occasion about front end work where I was asked and I had a brake reline that I was busy on. That is the only thing that you can say I refused because I had a brake job that I was working on.

Q. Will you tell us about that occasion? Who was present?

A. I believe Ed Anthony. I am not sure.

Q. You say that you were working on a brake reline job?      A. That's right.

Q. And do I understand that while you were on that job someone requested you to do a front end job?      A. Yes.

Q. What was your answer?

A. I said I was busy on the brakes. The brakes was my job.

Q. Was there anything else said at that time?

A. No. [432]

\* \* \*

JACKSON HOWELL

a witness called by and on behalf of the General Counsel having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Nutter:

Q. Mr. Howell, did you give a statement to the Field Examiner of the National Labor Relations Board?      A. I did.

Q. In that statement did you say that the only reason that Claud Leonard was fired was because of lack of work?

Mr. Nicoson: I suggest, your Honor, that he be given the statement.

Mr. Nutter: I am just asking him.

Mr. Nicoson: How would he know?

Mr. Nutter: If he recalls.

Mr. Nicoson: Pardon me.

Trial Examiner Myers: Do you recall that, Mr. Howell?

The Witness: I am trying to think of what I said to the man concerning——

Trial Examiner Myers: Do you want to see the statement?

Q. (By Mr. Nutter): Was Claud Leonard laid off for lack of work?      A. Yes.

Q. Was that the only reason?

A. That's the only reason we gave him. [436]

Q. Is that the only reason?      A. No.

Q. Did you make a statement to Mr. Norman

(Testimony of Jackson Howell.)

Greer, an agent of the National Labor Relations Board, on the 27th day of June, 1950, that Mr. Leonard was laid off for lack of work?

A. I don't think that is the correct date.

Q. That is not the correct date of the affidavit?

A. I don't think it is.

Q. Did you give a statement?

A. I gave him a statement.

Q. Did you give any other reasons for the layoff of Mr. Leonard to Mr. Greer other than he was laid off for lack of work?

A. I mentioned in there his seniority as compared with the seniority of Kenny Herrick.

Q. Did you mention any other reasons?

A. I don't believe so. [437]

\* \* \*

### FREDERICK A. POTRUCH

a witness recalled by and on behalf of the Employer, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Nicoson: [440]

\* \* \*

Q. Shortly after the date of that letter did you on behalf of Mr. Howell attend a conference or an informal meeting at the National Labor Relations Board? A. I did. [441]

\* \* \*



(Testimony of Frederick A. Potruch.)

Q. What did you say?

A. I simply said I don't think that they had a majority at the Howell Chevrolet Company, and there were other statements made. I don't think it is necessary to go into them unless you want them.

Q. What do you mean by that statement?

A. I meant that the union did not have a majority of the employees.

Q. Did you so state?

A. I so stated. [442]

\* \* \*

Q. Did the union produce any proof to you at that time that they had a majority?

A. The union did not produce any proof to me of a majority. [443]

\* \* \*

### EDWARD M. SKAGEN

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Nutter:

Q. Are you the same Mr. Skagen that testified before?      A. Yes, I am.

Q. Mr. Skagen, there has been some testimony here that there was a conference held, an informal conference, held in the National Labor Relations Board's office in the month of February with Mr.

(Testimony of Edward M. Skagen.)

Fred Davis, a Board Field Examiner, and Mr. Potruch concerning the Howell Chevrolet case. Did you ever attend such a conference?

A. Yes, I did.

Q. About when was that?

A. As I recall, it was in the month of February and I [444] believe the exact date would be around February the 6th.

Q. Will you tell us who was present there?

A. Well, there were two Field Examiners from the National Labor Relations Board. One was Mr. James Carr and the other one was Mr. Fred Davis and Mr. Frederick A. Potruch, myself and I am not certain but I believe Tiny Gordon and John Foote were present. I am not sure about the latter two, however.

Q. Will you tell us what took place at that conference?

A. Well, there was a mixup that morning. Mr. James Carr had a case called Standard Coil Company of which Frederick A. Potruch was the attorney, and we went down into Mr. Davis' office because we thought we could consolidate both cases.

Trial Examiner Myers: Who is "we"?

The Witness: The group of us, Frederick A. Potruch, myself, Mr. Carr. We went down there and found Mr. Davis in his office on the sixth floor of the National Labor Relations Board. The reason I remember it so well is because Mr. Potruch was sitting on the edge of the table and he says, "I am

(Testimony of Edward M. Skagen.)

going to surprise you. I am going to consent to an election. We admit that we are in commerce," and the commerce factor had been a big factor in these automotive cases at that time.

Then Mr. Potruch throws his hands up and says, "Da-dee-da-dee-da."

All of us were very surprised. I would say that everybody including the Field Examiner was speechless because he had [445] admitted commerce.

Then I says, "Oh, you are going to admit commerce in the Howell Chevrolet?"

Then we were deflated because he was admitting commerce in the Standard Coil case and he wasn't prepared to discuss, as I remember it, the Howell Chevrolet case at all that day and would not admit to commerce.

Q. (By Mr. Nutter): Will you tell us what was said about the Howell case?

A. I says, "Oh, I thought we were talking about the Howell Chevrolet case."

Frederick A. Potruch, attorney, says, "Now, Eddie, you know that I wouldn't admit to commerce in one of these automobile cases. We are going to have to go to a hearing on that. In fact, I didn't even bring a briefcase or any papers over on it."

Then we went ahead and discussed the Standard Coil case and as I remember it we did not discuss the Howell Chevrolet case any more that day.

Q. Was there any other discussion of Howell at all?

(Testimony of Edward M. Skagen.)

A. Not that I remember. In fact, I distinctly remember there not being any further discussion on it.

Q. Did Mr. Potruch say there that he didn't think the union had a majority at the Howell Company?      A. No, he did not. [446]

\* \* \*

### DELMAR A. GORDON

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Nutter:

Q. You are the same Mr. Gordon that testified previously in this hearing?      A. I am.

Q. Mr. Gordon, you have heard the testimony about this informal conference in the National Labor Relations Board's office in the month of February, 1950, involving the Howell [447] Chevrolet Company?      A. I have.

Q. Did you attend such a conference?

A. I did.

Q. Will you tell us what took place at that conference?

A. John Foote and myself came from the Valley that morning to attend the Howell Chevrolet informal conference. We went into Fred Davis' office and was waiting there when Mr. Potruch,



(Testimony of Delmar A. Gordon.)

Mr. Skagen and two other gentlemen came in. There were introductions but I didn't recognize either of the other men that I had ever met before. There was some discussion about—I think Mr. Davis brought up the subject of commerce. He said, "Are you going to admit commerce in this case," or something to those words.

Mr. Potruch said, "Yes, we are going to admit we are under commerce. I am going to surprise all you guys."

He says, "After all, we advertise on television and radio and so forth. Certainly we are in commerce."

We all kind of gasped a little bit because of the inferences in other cases where he so vigorously fought commerce jurisdiction. I don't know who said it, but somebody said, "You mean you are going to admit commerce in the Howell Chevrolet case?"

Potruch said, "Howell Chevrolet case! Hell, no. I am talking about the Standard Coil case." He says, "Howell [448] Chevrolet case, I have no papers or anything else here about that. I never met Mr. Howell. I don't know what kind of business he is in, whether he sells new cars or used cars."

As far as I remember, there was no more discussion other than he said that he was going to contest jurisdiction of the Board—I mean commerce and would have to go to a formal hearing on it. [449]

(Testimony of Delmar A. Gordon.)

Q. Is your answer no that you didn't present any proof?      A. That's right.

Q. All right. Did you present any proof to Mr. Potruch?

A. The case was not even discussed.

Q. Would you mind answering the question? Did you or did you not present any proof to Mr. Potruch at any time?      A. No. [450]

\* \* \*

### Certificate

This is to certify that the attached proceedings before the National Labor Relations Board for the 21st Region in the matter of: Howell Chevrolet Company, and International Association of Machinists, District Lodge No. 727, Cases Nos. 21-CA-794, 21-RC-1146, Los Angeles, California, October 31, 1950, Pages 1 to 118, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING  
COMPANY,

Official Reporters.

By /s/ ARNOLD PAUL,  
Field Reporter.

In the United States Court of Appeals  
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,  
Petitioner,

vs.

HOWELL CHEVROLET COMPANY,  
Respondent.

CERTIFICATE OF THE NATIONAL LABOR  
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of the proceedings had before said Board, entitled, “In the Matter of Howell Chevrolet Company and International Association of Machinists, District Lodge No. 727,” and, “In the Matter of Howell Chevrolet Company, Employer, and International Association of Machinists, District Lodge No. 727,” the same being known as Cases Nos. 21-CA-794 and 21-RC-1146, respectively, before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceedings was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Howard Myers Trial Examiner for the National Labor Relations Board, dated October 31, 1950.

(2) Stenographic transcript of testimony taken before Trial Examiner Myers on October 31, 1950, November 1, 2, and 3, 1950, together with all exhibits introduced in evidence.

(3) Trial Examiner's order correcting the record, dated December 4, 1950, with stipulation to correct typographical error in transcript annexed, together with affidavit of service and United States Post Office return receipts thereof.

(4) Copy of Trial Examiner Myers' Intermediate Report, dated December 19, 1950, (annexed to item 12 hereof); order transferring case to the Board, dated December 20, 1950, together with affidavit of service and United States Post Office return receipts thereof.

(5) Respondent's letter, dated December 29, 1950, requesting permission to argue orally before the Board. (Denied, see Board's Decision and Order dated July 23, 1951, page 2, footnote 2.)

(6) Respondent's telegram, dated January 4, 1951, requesting extension of time for filing exceptions and briefs.

(7) Copy of Board's telegram, dated January 8, 1951, granting all parties extension of time to file exceptions and briefs.



(8) Respondent's exceptions to the Intermediate Report, received January 22, 1951.

(9) General Counsel's telegram, dated January 25, 1951, requesting leave to file reply brief.

(10) Respondent's telegram, dated January 25, 1951, opposing General Counsel's request for leave to file reply brief.

(11) Copy of Board's telegram, dated January 25, 1951, granting General Counsel leave to file reply brief.

(12) Copy of Decision and Order issued by the National Labor Relations Board on July 23, 1951, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 15th day of October, 1951.

/s/ FRANK M. KLEILER,  
Executive Secretary.

[Seal]

NATIONAL LABOR  
RELATIONS BOARD.

[Endorsed]: No. 13140. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Howell Chevrolet Company, a Corporation, Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed October 22, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the  
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH  
PETITIONER INTENDS TO RELY

To the Honorable Judges of the United States  
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, Petitioner in the above proceeding, in conformity with the rules of this Court, hereby states the following points as those on which it intends to rely herein:

1. The Act, as amended, is applicable to the respondent.

2. The Board properly held that respondent violated Section 8 (a) (1) of the Act by interfering with and coercing its employees by means of interrogation and threats of reprisal and promise of benefit.

3. The Board properly held that respondent violated Section 8 (b) (3) of the Act by discriminatorily discharging Claude Leonard, an employee.

4. The Board properly held that respondent refused to bargain, in violation of Section 8 (a) (5) of the Act.

Dated at Washington, D. C., this 15th day of October, 1951.

NATIONAL LABOR  
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,  
Assistant General Counsel.

[Endorsed]: Filed October 22, 1951.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN  
ORDER OF THE NATIONAL LABOR  
RELATIONS BOARD

To the Honorable, the Judges of the United States  
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Howell Chevrolet Company, Glendale, California, its officers, agents, successors, and assigns. The proceedings resulting in said order are known the records of the Board as "In the Matter of Howell Chevrolet Company and International Association of Machinists, District Lodge No. 727, Case No. 21-CA-794"; and "In the Matter of Howell Chevrolet Company, Employer, and International Association of Machinists, District Lodge No. 727, Petitioner, Case No. 21-RC-1146."

In support of this petition the Board respectfully shows:

(1) Respondent is a California corporation engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.



(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on July 23, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

### Order

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Howell Chevrolet Company, Glendale, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, District Lodge No. 727, or any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment, because of their membership in, or activity on behalf of, any such labor organization.

(b) By means of interrogation, threats of reprisal, promises of benefit, or in any other manner, interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist

International Association of Machinists, District Lodge No. 727, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from the exercise of such rights.

(c) Refusing, upon request, to bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all its employees at its Glendale, California, plant, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District Lodge No. 727, as the exclusive representative of all the employees in the above-described appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to Claude Leonard immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights or privileges.

(c) Make whole Claude Leonard, in the manner set forth in the section entitled "The Remedy," for any loss of pay which he may have suffered by

reason of the Respondent's discrimination against him.

(d) Upon request, make available to the Board or its agents for examination and copying, all pay roll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Order.

(e) Post in its plant at Glendale, California, copies of the notice attached hereto and marked "Appendix A."<sup>20</sup> Copies of said notice to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

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<sup>20</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the notice, before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."



(3) On July 23, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceedings before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon so much of the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR  
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,  
Assistant General Counsel.

Dated at Washington, D. C., this 15th day of October, 1951.



## Appendix

### Notice to All Employees

#### Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Association of Machinists, District Lodge No. 727, or in any other labor organization of our employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment, because of their membership in, or activity on behalf of, any such labor organization.

We Will Not by means of interrogation, threats of reprisal, promises of benefit, or in any manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, District Lodge No. 727, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employ-

ment as authorized in Section 8 (a) (3) of the National Labor Relations Act.

We Will offer to Claude Leonard, immediate reinstatement to his former or substantially equivalent position without prejudice to seniority or other rights and privileges previously enjoyed, and will make him whole for any loss of pay he may have suffered as a result of the discrimination against him.

We Will bargain collectively, upon request, with the above-named union as the exclusive representative of all our employees in the bargaining unit described herein, with respect to rates of pay, wages, hours of work, or other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The Bargaining Unit is

All our employees, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the National Labor Relations Act.

All our employees are free to become, or refrain from becoming members of the above-named union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employees be-

cause of membership in or activity on behalf of any labor organization.

Dated.....

HOWELL CHEVROLET  
COMPANY,  
(Employer).

By.....,  
(Representative) (Title).

This notice must remain posted for 60 days from date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed October 22, 1951.

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[Title of Court of Appeals and Cause.]

RESPONDENT'S ANSWER TO PETITION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS  
BOARD

To the Honorable, the Judges of the United States  
Court of Appeals for the Ninth Circuit:

Comes now Howell Chevrolet Company, respondent in the above-entitled matter, and for answer to the petition for enforcement of an order of the National Labor Relations Board, denies, admits and alleges as follows:

I.

Respondent admits that it is a corporation organized and existing under and by virtue of the laws

of the State of California, and is engaged in business in the State of California, within the judicial circuit of this Honorable Court, but denies, generally and specifically, that any unfair labor practices occurred within that judicial circuit or any other judicial circuit. Respondent further admits that by virtue of Section 10 (e) of the National Labor Relations Act, as amended, this Honorable Court has jurisdiction to review purported orders of the National Labor Relations Board.

## II.

Respondent admits that on or about July 23, 1951, the National Labor Relations Board issued a purported order in substance and form, as alleged in the aforesaid petition, but denies that said purported order is valid, and alleges that said purported order is contrary to law and is not sustained by findings of fact which are supported by substantial evidence on the record considered as a whole.

## III.

Further answering, respondent alleges that the purported order and findings of the National Labor Relations Board to the effect that respondent is engaged in the business affecting commerce within the meaning of the National Labor Relations Act, as amended, is not supported by substantial evidence on the record considered as a whole and is therefore void and of no effect.

## IV.

Further answering, respondent alleges that said



purported order of the National Labor Relations Board is unconstitutional and void in that it deprives respondent of rights guaranteed to it by the Fifth Amendment to the United States Constitution.

V.

Further answering, respondent alleges that the record does not contain substantial evidence on the record considered as a whole sufficient in law to support said purported order of the National Labor Relations Board, or any part thereof.

VI.

Respondent admits that on or about July 23, 1951, respondent received by registered mail a copy of the purported order of the National Labor Relations Board.

VII.

Respondent admits that the National Labor Relations Board has certified and filed with this Court a transcript of the record of the proceedings before the Board, including the pleadings, testimony in evidence adduced before the Trial Examiner, but denies that the findings of fact, conclusions of law and order of the National Labor Relations Board have been made upon such record, and alleges that said findings of fact and conclusions of law and order of the Board are contrary to Section 10 of the National Labor Relations Act, as amended.

Wherefore, respondent having fully answered prays that the petition for enforcement of the

order of the National Labor Relations Board be dismissed.

/s/ JAMES M. NICOSON,  
CARTER & POTRUCH,

By /s/ FREDERICK A. POTRUCH,  
Attorneys for Respondent, Howell Chevrolet Com-  
pany.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 5, 1951.

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[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH  
RESPONDENT INTENDS TO RELY

To the Honorable, the Judges of the United States  
Court of Appeals for the Ninth Circuit:

The respondent in the above-entitled matter, in conformity of the rules of this Court, hereby states the following points as those on which it intends to rely herein:

(1) That the National Labor Relations Board does not have jurisdiction over respondent, or its business.

(2) That respondent is not engaged in a business affecting commerce within the meaning of the National Labor Relations Act, as amended.

(3) That the proceedings before the Board are unconstitutional and void in that they have deprived respondent of rights granted to it by the Fifth Amendment of the United States Constitution.

(4) That respondent was not accorded a fair and impartial hearing before an impartial Trial Examiner and was not afforded the requisites of due process of law, as guaranteed to it by the Fifth Amendment of the Constitution of the United States.

(5) That the Board's findings of fact and conclusions of law that respondent had interfered with and coerced its employees in violation of Section 8 (a) (1) of the National Labor Relations Act was not supported by substantial evidence on the record considered as a whole and therefore is void and of no effect.

(6) That the Board's findings of fact and conclusions of law that respondent did discriminatorily discharge Claude Leonard in violation of Section 8 (a) (3) of the National Labor Relations Act is not supported by substantial evidence on the record considered as a whole and is therefore void and of no effect.

(7) That the findings of fact and conclusions of law of the Board that respondent had refused to bargain in violation of Section 8 (a) (5) of the National Labor Relations Act, as amended, is not supported by substantial evidence on the record considered as a whole and is therefore void and of no effect.

Dated at Los Angeles, California, this 1st day of November, 1951.

HOWELL CHEVROLET  
COMPANY,

By /s/ JAMES M. NICOSON,  
CARTER & POTRUCH,

By /s/ FREDERICK A. POTRUCH,  
Attorneys for Howell  
Chevrolet Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 5, 1951.

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[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America  
Howell Chevrolet Company, 1000 South Brand  
Boulevard, Glendale, California, and Interna-  
tional Association of Machinists, District Lodge  
No. 727, Att: Messrs. E. M. Skagen and Delmar  
Gordon, 904 Van Nuys Bldg., Los Angeles (14)  
California

Greeting:

Pursuant to the provisions of Subdivision (e)  
of Section 160, U.S.C.A. Title 29 (National Labor  
Relations Board Act, Section 10(e)), you and each  
of you are hereby notified that on the 22nd day of



October, 1951, a petition of the National Labor Relations Board for enforcement of its order entered on July 23, 1951, in a proceeding known upon the records of the said Board as "In the Matter of Howell Chevrolet Company and International Association of Machinists, District Lodge, No. 727, Case No. 21-CA-794; and In the Matter of Howell Chevrolet Company, Employer and International Association of Machinists, District Lodge No. 727, petitioner, Case No. 21-RC-1146," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 22nd day of October in the year of our Lord one thousand, nine hundred and fifty-one.

[Seal]      /s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

Returns on service of Writ attached.

[Endorsed]: Filed November 7, 1951.



No. 13140

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

*v.*

**HOWELL CHEVROLET COMPANY, RESPONDENT**

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**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

---

**GEORGE J. BOTT,**

*General Counsel,*

**DAVID P. FINDLING,**

*Associate General Counsel,*

**A. NORMAN SOMERS,**

*Assistant General Counsel,*

**MARCEL MALLET-PREVOST,**

**WILLIAM J. AVRUTIS,**

*Attorneys,*

*National Labor Relations Board.*

---

**FILED**

**FEB - 4 1952**

**PAUL P. O'BRIEN  
CLERK**





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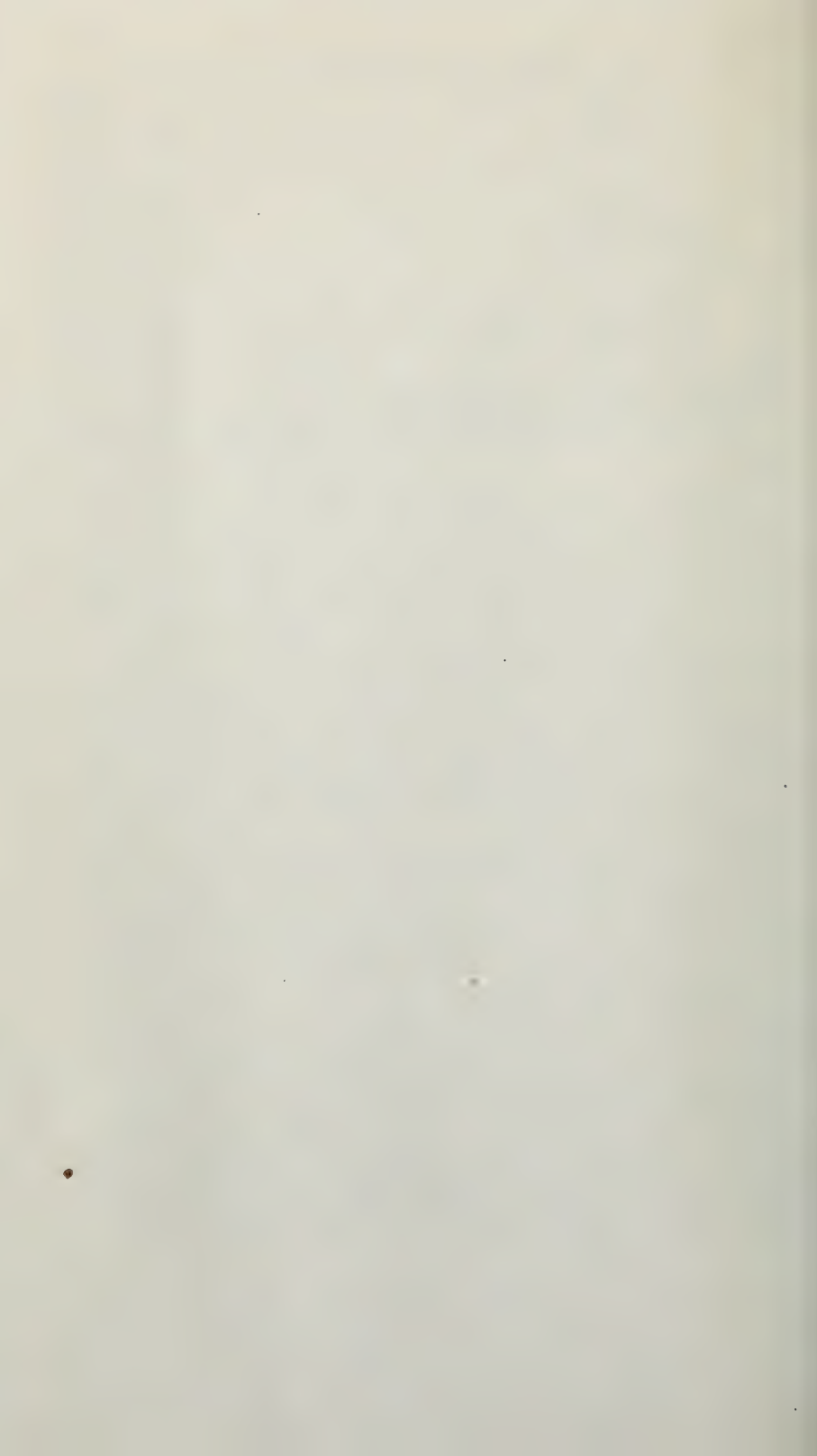
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# In the United States Court of Appeals for the Ninth Circuit

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No. 13140

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOWELL CHEVROLET COMPANY, RESPONDENT

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, et seq.),<sup>1</sup> for enforcement of its order (R. 64-70)<sup>2</sup> issued July 23, 1951, against respondent Howell Chevrolet Company, following the usual proceedings under Section 10 of the Act. The Board's Decision and Order are reported in 95 NLRB No. 62. This Court has jurisdiction under Section 10 (e) of the

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<sup>1</sup>The pertinent provisions of the Act are set forth in the Appendix, *infra*.

<sup>2</sup>In the following statement, whenever a semicolon appears, record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

Act, the unfair labor practices having occurred within this judicial circuit, at respondent's place of business in Glendale, California.<sup>3</sup>

## STATEMENT OF THE CASE

### I. The Board's findings of fact

The Board's findings that respondent engaged in acts of interference and coercion, refused to bargain with its employees' representative, and discharged an employee because of his union activities, in violation of Section 8 (a) (1), (3), and (5) of the Act, may be summarized as follows:

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<sup>3</sup> Respondent, a California corporation, operates an automobile agency and repair and service shop at Glendale, California, as an integral part of the national system of distribution of Chevrolet Motor Division, General Motors Corporation. It is one of a limited number of dealers authorized to sell new Chevrolet motor vehicles, parts, and accessories under a dealers agreement with Chevrolet Motor Division, General Motors Corporation, pursuant to which the latter exercises control over the respondent's capital requirements, place of business, hours, servicing facilities, personnel, signs, and local area advertising (R. 15-16, 55-56; 3, 9, 75-78, 89-90). Chevrolet Division, General Motors Corporation supplies respondent with new cars and trucks from an assembly plant maintained at Van Nuys, California. During the fiscal year ending September 30, 1945, approximately 43 percent of the component parts shipped to said plant were obtained from points located outside the State. During the same year, respondent's purchases from Chevrolet Motor Division, General Motors Corporation exceeded \$1,500,000 (R. 16-17; 92-97). It is clear that respondent is engaged in commerce within the meaning of the Act. *N. L. R. B. v. Townsend*, 185 F. 2d 378, 382 (C. A. 9), certiorari denied, 341 U. S. 909; *N. L. R. B. v. Ken Rose Motors, Inc.*, decided January 21, 1952 (C. A. 1); *N. L. R. B. v. Conover Motor Co.*, decided November 5, 1951 (C. A. 10), 29 LRRM 2044, 2045; *N. L. R. B. v. Davis Motors, Inc.*, decided November 5, 1951 (C. A. 10), 29 LRRM 2046. Cf. *Williams Motor Co. v. N. L. R. B.*, 128 F. 2d 960, 962-964 (C. A. 8).

**A. The Union's majority status and request for recognition and a bargaining conference**

On January 30, 1950, a number of respondent's employees attended a meeting of the Union<sup>4</sup> and elected Claude Leonard, one of their number, senior chairman or shop steward (R. 20-21; 114-116). By the following day, 15 of the 28 employees in the bargaining unit<sup>5</sup> had designated the Union as their collective bargaining representative (R. 20, 21; 115-130, 161-162, 192-193, 204-205, 216-217, 218-220, 221-222, 224-225, 232-234, 101-102, 90-91, 193-194, 195, 102, 163, 205-206, 218-219).<sup>6</sup> The Union thereupon wrote respondent that a majority of its employees had chosen it as their collective bargaining representative and asked for recognition and a conference to discuss a collective bargaining agreement (R. 21; 214-215). On the same day, January 31, the Union filed a representation petition with the Board (R. 21). The Board subsequently conducted an election on June 1 (R. 12).

**B. Respondent's refusal to recognize the Union and efforts to destroy its majority**

Respondent admittedly failed to answer the union's letter which it received the next day, February 1 (R. 21, 61; 213-215, 216). Indeed, respondent's president,

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<sup>4</sup> International Association of Machinists, District Lodge No. 727.

<sup>5</sup> The bargain unit found appropriate by the Board consisted of all respondent's employees except supervisors and certain non-operating employees (R. 18; 5, 9).

<sup>6</sup> The Board found that Frank Ogen, foreman of the body shop named in respondent's list of employees working for it on January 31, 1950 (R. 101-102), was a supervisor (see *infra*, pp. 15-17) and therefore not to be considered an "employee" within the bargaining unit (R. 19-22, 57).

its attorney, its service manager, and the foreman of its body shop all acted to bring home to the employees the futility of their supporting the Union and the advantage which would accrue to them if they kept away from it.

*1. Threats of discharge and shut-down by Foreman Ogen and Service Manager Bordeaux*

On January 31, the morning following Leonard's election as shop steward at the Union meeting, Leonard and other employees appeared at work wearing Union buttons (R. 21; 120-121, 251). A day or two later, Employee Arnold asked Foreman Ogen "what he thought about the guys going in [the union]," and the foreman replied that "they better watch out for their jobs, because [President] Howell said to fire them all that are wearing buttons" (R. 23, 57; 204-206). Leonard, whose Union button was inscribed "Senior Chairman" (R. 21; 120-121, 189, 251), continued to wear it while at work, and several days later Foreman Ogen told him "to get away" from him "with that button on," because he (Ogen) "didn't want to get fired" (R. 22, 57; 131). When Leonard replied that nobody was going to be fired because of the buttons, Ogen said that President Howell had told him that "he was going to fire anybody that joined the union" (R. 22, 57; 131, 236). Leonard and Kirkland, another employee, later asked Foreman Ogen where he had gotten his information that all the employees who joined the Union were going to be fired, and Ogen repeated that President Howell had told him so the previous night (R. 22-23, 57; 163-164). Ogen made like remarks to Employee Smith who worked in his



department. Several times, some weeks before the Board conducted the election of June 1, he told Smith that any man who joined the Union would be fired, that he himself never had worked in a union shop, never would, and that he would not have any union men working for him (R. 23, 57; 194-196). In addition, during this period, Ogen asked Smith what he "was going to do about the Union," whether he "was in the Union," and if Employee Kirkland had induced him to join (*ibid*). Respondent neither called Foreman Ogen to deny these remarks nor explained his absence (R. 22).

During the same period Service Manager Bordeau told a group of employees that "if the union was defeated, everyone would get a raise" (R. 31, 58; 228-230, 250), and warned Employee Herrick that "If the union went in, Howell would shut his doors" (R. 31, 58; 196-197).

*2. Attorney Potruch's announcement of respondent's antiunion position and firm intention not to bargain*

About the latter part of March 1950, respondent assembled all its shop employees (R. 23; 270-277). President Howell introduced respondent's attorney, Frederick A. Potruch, to the meeting and told the employees that he would explain respondent's labor relations policies (R. 23-24; 237-238, 271-272, 167, 179-180, 88).

In a lengthy talk Potruch told the employees that respondent did not like "having anyone step in and tell them what to do and what not to do," and intended to challenge the jurisdiction of the Board, fighting the case to its "last dollar" and up to the

Supreme Court, if the Board did not uphold respondent in its position (R. 24, 25, 27, 61, 62; 272-275, 167-168, 172, 180). He further declared that if the Board asserted jurisdiction over respondent, the only way to get an adequate test on the question of jurisdiction would be to go into the Circuit Court of Appeals and that:

It might even necessitate \* \* \* that for any company, not necessarily Howell, to get a case into the United States Circuit Court of Appeals, it might be necessary to do something to be cited for an unfair act under the National Labor Relations Act; that someone might have to be discharged, either on a friendly basis or even deliberately and then the charge brought \* \* \* (R. 25, 58; 274).

Potruch also stated that the employees did not need a union since this was a small establishment; that the employees would never get a union contract from Howell; that the employees would have to go out on strike to obtain a contract; and that respondent could not make any change in wages or other working conditions unless it consulted the Union, but "by God the Company wouldn't do that." (R. 25-26, 56, 58; 167-168, 180; 175-176; 183.) Potruch added that if he were an employee with any problems he would go to the employer individually and work them out with him personally (R. 27, 62; 277-278). However, he pointed out, the employees "had gone too far" to be free to speak for themselves any more, for they had voluntarily selected somebody to represent them and "do all their talking for them at any time they wanted to" (R. 62; 277-278). Potruch also made it plain to the employees that even if the Union, already

so chosen by the employees, won the election, respondent still would refuse to bargain with it and might employ such refusal as a way to obtain a court test of the Board's jurisdiction under the Act (R. 26-27, 56, 58; 185, 171-172).

Potruch again visited the plant about two weeks before June 1, the election date (R. 28; 200-201). On this occasion, while talking about the election, he told a group of employees that "There would be a new deal after the first of the month" (R. 59; 201).

### *3. President Howell's promises of pay increases and solicitation of employee rejection of the Union*

During the two week period before the election, President Howell told Employee Skelton that "If the union was defeated, why, everybody would get a raise" (R. 30, 58; 226-228). Similarly, Howell promised Employee Hansen to see to it that he "got a raise in time" if Hanson voted "in favor of the plant" (R. 30, 57; 209-210, 212). To Employee Smith, Howell said, "He didn't want the National Labor Relations Board in there to tell him how to run his business" adding that if the Union should be defeated at the election respondent would raise his commissions as a body man from 40 to 50 percent<sup>7</sup> (R. 30, 58; 197-199, 201-202).

### **C. Respondent's discharge of Union Steward Leonard**

#### *1. Leonard's long and varied experience*

At the time of his discharge on March 31, 1950, Leonard had 25 years experience as an all around

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<sup>7</sup> Howell later kept his promise. Three or four days after the Union lost the election, Howell at a company banquet given all the employees, announced a general wage increase which included a raise in commissions. Bodymen were raised to 50 percent and mechanics to 45 percent (R. 31; 242-244).



mechanic (R. 38; 102-107, 109). He was a certified and approved Chevrolet mechanic and had received the General Motors Diploma for nine successive years after completing courses of instruction in Chevrolet mechanics and repair (R. 38-39; 110-114). He received his eighth annual diploma while still in respondent's employ and his ninth about a month after his discharge (R. 39; 111-113). He had also operated his own automobile repair shop for three years between 1929 to 1933 (R. 39; 104-106). Although Leonard was engaged in brake adjustment work at the time of his discharge, his experience both in and out of respondent's employ included front end work (R. 39; 103, 107, 108, 109, 152-156) as well as the overhauling and repair of motors, transmissions, and rear ends, grinding valves, and other types of mechanical work performed in a general garage (R. 39; 103-104, 107, 108, 109).

Respondent employed Leonard twice. In 1944, he came in as a line mechanic. His broad duties as such required him, in addition to doing front end work, to overhaul motors and transmissions, do rear end work, and reline and adjust brakes (R. 39; 106-107). After Leonard had been with respondent for a little over a year, respondent's service manager opened his own repair shop and took Leonard with him to work as a general mechanic (*ibid.*).

In January 1948, respondent employed Leonard again, this time as a brake repairman (R. 39; 109). Although he regularly relined and adjusted brakes, overhauled and repaired wheel and master cylinders and made other repairs on the brake system (R. 39;



109) he also had repeated occasion to do front end work as well as other types of work during busy periods (R. 39; 151-153). Thus, during two weeks in August 1949, when the regular front end man was on vacation, and also when he was away for some days at other times on account of sickness, Leonard performed the latter's front end work in addition to his own regular duties (R. 39-40; 109-110, 152-158).

*2. Leonard's outstanding union activity and respondent's threats of discharge for supporting the Union*

Leonard joined the Union on January 23, being the first man in the shop to do so (R. 20, 40; 114). He was elected senior chairman or shop steward on January 30, and respondent admittedly noted that he began wearing his "senior chairman" button to work the following day (R. 20-21, 40; 115, 120-121, 249-251). As leader of the Union's organizational drive, he openly solicited and obtained many new union supporters (R. 40; 121-124, 125-129, 220-223, 256, 291, 293, 294, 297-298, 301-302). As we have seen (*supra*, p. 4), about a week after Leonard first wore his button to work, Body Shop Foreman Ogen warned Leonard "To get away from him with that button on" as "he did not want to get fired" and stated also that President Howell told him (Ogen) that he was "going to fire anybody that joined the Union." During the same week and while Kirkland was also wearing a Union membership button, Foreman Ogen repeated to him and to Leonard that President Howell had said that he intended to discharge all members of the Union (*supra*, p. 4).

### 3. Respondent's discharge of Leonard, allegedly for economic reasons

Leonard derived his earnings solely from commissions received for work done for specific customers (R. 40-41; 131, 134, 139). During the month prior to January 31, his bi-weekly net earnings after deductions for withholding tax, social security, and the like amounted to about \$150 (R. 41; 135-137). In the beginning of the following month, however, and coincidentally with the manifestation of Leonard's leadership in the Union, Service Manager Bordeau began assigning work normally assigned to Leonard to the men who worked on the lubrication rack, one of whom was Bordeau's son (R. 41; 139-148, 164-167, 178-179). Reflecting this diversion of available work, Leonard's bi-weekly net earnings fell substantially (R. 41; 135-136).<sup>8</sup> On March 21, and just after Leonard had finished working overtime, Bordeau discharged him. He told Leonard that there was not enough work for the brakeman and the front end man to each make a living and that respondent had decided to combine front end and brake jobs and keep in its employ only Herrick, the front end man (R. 41; 137-138). Respondent has advanced no other reason for the discharge (R. 42). Leonard protested that he had more seniority than Herrick and that he also could perform front end work. Bordeau replied, however, "that is the way it is to be and he could do nothing further about it" (*ibid.*).

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<sup>8</sup> Leonard's bi-weekly net earnings were \$98.27 as of February 15, \$45.52 as of February 28, \$69.30 as of March 15, and \$87.22 as of March 31.

In the two-month period after Leonard's discharge, and before the election (*supra*, p. 3), respondent admittedly had "a busy season" (R. 266). Herrick's earnings nearly doubled and he found it necessary to call in an outside worker about 4 times in order to help get his job done (R. 42; 266, 255-256, 264-265, 182, 188-189, 248-249). Service Manager Bordeau testified that he did not recall Leonard to help Herrick, instead of allowing Herrick to obtain strange help, because he did not know where to reach Leonard (R. 42-43; 266). However, Leonard had visited respondent's establishment several times during this period (R. 43; 149-150). Moreover, President Howell himself saw Leonard there and once personally ordered him off the premises (R. 43; 150). Bordeau also testified that Leonard could not do front end work and had indicated that he would not be interested in the combined brake and front end job because "some time in 1949" he had refused to do certain front end alignment work (R. 43; 267-268). Leonard, who had frequently done front end work for respondent (*supra*, pp. 8-9), had refused to do the particular front end alignment work when Bordeau had requested it only because he was actually working on another job at the time and was unable to undertake the extra work in addition (R. 43; 302, 148-149).

## II. The Board's conclusions

On the basis of the foregoing facts, and upon the whole record, the Board concluded that respondent, in violation of Section 8 (a) (1) of the Act, interfered



with, restrained and coerced its employees by threats of discharge of union supporters; by threats of a plant shutdown if the Union won the Board-conducted election; by promises of pay increases if the Union were defeated; by interrogation as to employee Union membership and activity; and by announcing that it would not bargain with the Union and would never recognize or contract with it (R. 56-59).

The Board also found that respondent discharged Leonard in violation of Section 8 (a) (3) of the Act because of his Union membership and activities (R. 59-60). The Board rejected respondent's contentions that it discharged Leonard because of economic reasons and that it had selected him for dismissal because he was not qualified to do front end work and had indicated a lack of interest in it (R. 43).

The Board further concluded that on or after February 1, 1950, respondent failed to bargain with the Union, in violation of Section 8 (a) (5) of the Act (R. 60-61, 37-38). The Board found that respondent in refusing to recognize and bargain with the Union, was not motivated by any good faith doubt of the Union's majority in an appropriate bargaining unit, but solely by a desire to gain time in which to destroy the Union's majority and also by a rejection of the collective bargaining principle (R. 61-62, 33-38).

### III. The Board's order

The Board's order (R. 64-70) requires respondent to cease and desist from the unfair labor practices found. As affirmative action, the order requires re-



spondent, upon request, to bargain collectively with the Union, offer reinstatement with back pay to Employee Leonard, make available to the Board, upon request, its records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of its order, and post the usual notices.<sup>9</sup>

## ARGUMENT

### I

**Substantial evidence supports the Board's finding that respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act**

Respondent's reaction to its employees' exhibition of interest in the Union was an outright counter-offensive of elementally unlawful interference, restraint and coercion, conducted by its president, service manager, body shop foreman, and attorney (*supra*, pp. 4-7).

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<sup>9</sup> The Board dismissed the complaint insofar as it alleged that respondent also violated Section 8 (a) (4) of the Act in discharging Leonard (R. 67). The Board found that Attorney Potruch's statements to respondent's employees that respondent would contest the Board's jurisdiction, while not violative of Section 8 (a) (1) of the Act, were calculated to impress upon the employees the futility of voting for the Union in the election. The Board found in addition that by these remarks, as well as by its conduct in violation of Section 8 (a) (1) and (3), respondent created an atmosphere incompatible with the employees' freedom of choice in their selection of a bargaining representative and thus interfered with the election (R. 63). Further finding no actual good faith doubt of the Union's majority on respondent's part and therefore no existing question affecting representation, the Board concluded that the election should be regarded as a nullity. The Board therefore dismissed the petition in the representation case which had been consolidated with this proceeding (R. 63, 67).

Thus, through Foreman Ogen, respondent threatened that it would dismiss union supporters (*supra*, pp. 4-5). Through Attorney Potruch, respondent elaborately brought home to its employees the possibility that, as a tactic in its envisioned fight "to the last dollar," against submitting to the collective bargaining requirements of the Act, respondent might find it "necessary to do something to be cited for an unfair act," "someone might have to be discharged \* \* \* deliberately" as a means of making a case in order to bring the matter of the Board's jurisdiction squarely before the courts (*supra*, p. 6).<sup>10</sup> Through Service Manager Bordeau respondent threatened that it would shut down its operations rather than bargain with the Union (*supra*, p. 5),<sup>11</sup> and Attorney Potruch declared that, in any event, it would not recognize the Union or contract with it unless its employees could succeed in forcing it to do so through resort to a strike (*supra*, p. 6).<sup>12</sup> Balancing the threats of reprisal with promises of benefit, President Howell offered to increase the employee commission rate in

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<sup>10</sup> *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 518; *Texas Co. v. N. L. R. B.*, 135 F. 2d 562, 563 (C. A. 9); *N. L. R. B. v. Polson Logging Co.*, 136 F. 2d 314 (C. A. 9); *N. L. R. B. v. Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C. A. 9); *N. L. R. B. v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 833 (C. A. 9).

<sup>11</sup> *N. L. R. B. v. Polson Logging Co.*, 136 F. 2d 314 (C. A. 9); *N. L. R. B. v. Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C. A. 9); *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 246, 247 (C. A. 9).

<sup>12</sup> See *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 590 (C. A. 9); *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 245, 246, 247 (C. A. 9). See also, *N. L. R. B. v. Bradford Dyeing Assn.*, 310 U. S. 318, 337.

return for defeat of the Union in the scheduled election (*supra*, p. 7),<sup>13</sup> and Service Manager Bordeau declared that "everyone would get a raise" (*supra*, p. 5). Finally, through Foreman Ogen, respondent engaged in extensive interrogation of its employees about their union sympathies and activities (*supra*, p. 5), action which is coercive in itself<sup>14</sup> and, in a context of blatant antiunionism, is doubly so.<sup>15</sup>

Respondent's contention before the Board, that it was not responsible for Foreman Ogen's antiunion activities because Ogen was not really a supervisory employee was properly rejected (R. 57, n. 5). The record leaves no question but that Ogen was foreman of the body shop and thus part of management. When President Howell was asked at the hearing to describe the Company's operations he testified (R. 89): "We have a new car sales room, a parts department, a service department, lubrication department, body shop \* \* \*." Describing the management of these departments, President Howell testified (R. 90): "We operate with a sales manager of new cars, a parts manager in charge of the parts department, a service manager in charge of the

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<sup>13</sup> *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 684; *N. L. R. B. v. Fitzpatrick & Weller, Inc.*, 138 F. 2d 697, 699 (C. A. 2); *N. L. R. B. v. Ford*, 170 F. 2d 735 738 (C. A. 6); *M. H. Ritzwoller Co., v. N. L. R. B.*, 114 F. 2d 432, 435 (C. A. 7).

<sup>14</sup> *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 743 (C. A. D. C.), certiorari denied, 341 U. S. 914.

<sup>15</sup> *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 518; *N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 590 (C. A. 9); *N. L. R. B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 245 (C. A. 9); *N. L. R. B. v. Holtville Ice & Cold Storage Co.*, 148 F. 2d 168, 169-170 (C. A. 9).



service department with a body shop foreman under his jurisdiction, and a used car manager.” Howell then named Frank Ogen as the body shop foreman (R. 90–91).<sup>16</sup> As the Board noted (R. 57, n. 5), Employee Smith, who did body and fender work, testified that Ogen was his foreman and that Ogen had told him “He wouldn’t have any union man working under him” (R. 193–194). Employee Arnold, also a body and fender worker, likewise testified that Ogen was his foreman (R. 204, 206), as did Employees Kirkland and Leonard (R. 131, 163). The Board pointed out (R. 57, n. 5) that although “it was clear at the hearing that the General Counsel was seeking to attribute to the respondent various [unlawful] acts of interference \* \* \* by virtue of Ogen’s supervisory status \* \* \* Respondent did not contend that Ogen was not a supervisor or come forward with evidence to rebut the testimony indicating that Ogen was a supervisor.”

There is no basis therefore for regarding Ogen’s supervisory status as being any different than that which ordinarily attaches to the familiar term “foreman.” Ogen did not testify (R. 22, n. 12), and certainly respondent’s bare unsupported statement, made in its briefs to the Board and trial examiner after the close of the hearing, that Ogen was not a supervisory employee, does not offset the contrary evidence referred to above. We submit that the Board correctly concluded (R. 57, n. 5), as had the trial examiner

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<sup>16</sup> Ogen’s name is misprinted “Frank Hogan” at R. 90, but correctly printed “Frank Ogen” at R. 91.



(R. 19, 22, n. 12), that “In the light of the entire record \* \* \*. \* \* \* Ogen was a supervisor within the meaning of the Act and \* \* \* his conduct was attributable to the Respondent.”<sup>17</sup> *International Assn. of Machinists v. N. L. R. B.*, 311 U. S. 72, 79, 81; *N. L. R. B. v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 833 (C. A. 9); *Ohio Power Co. v. N. L. R. B.*, 176 F. 2d 385 (C. A. 6), certiorari denied, 338 U. S. 899.

## II

**Substantial evidence supports the Board’s finding that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) and (1) of the Act**

**A. The Union represented a majority of the employees in an appropriate unit**

The Board found that at the time of the refusal to bargain on February 1, 1950, the Union had been designated as their bargaining representative by a

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<sup>17</sup> Apart from Foreman Ogen’s conduct, the concurrent anti-union activities of respondent’s president, its service manager, and its attorney (*supra*, pp. 4-7), fully support the Board’s conclusion and order relating to unlawful interference and coercion (R. 56-58, 65). Respondent’s contention that Foreman Ogen’s acts of interference were, in any event “isolated” is manifestly without basis. Indeed, in light of the similarity between Foreman Ogen’s antiunion activities and those of the three unquestioned representatives of management, it is fair to say that, regardless of Ogen’s actual supervisory status “respondent’s employees had just cause to believe that [he was] acting for and on behalf of respondent and that respondent was responsible for [his] activities.” *N. L. R. B. v. Germain Seed Co.*, 134 F. 2d 94, 99 (C. A. 9), and cases there cited; *N. L. R. B. v. Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 833 (C. A. 9). Cf. *N. L. R. B. v. Fred P. Weissman Co.*, 170 F. 2d 952, 954 (C. A. 6), certiorari denied, 336 U. S. 972.

majority of the employees in an appropriate bargaining unit (R. 18-20, 55, 60-62). While respondent does not question the correctness of the Board's unit determination (R. 5, 9),<sup>18</sup> it challenges, as unsupported, the finding with respect to the Union's majority.

The Board found, on the basis of a list prepared by respondent that there were 28 employees in the unit (R. 19; 101-102, 234-235). Of these, 14 had signed Union designation cards on or before January 31 (R. 20; 117-118, 119-120, 122-125, 127, 130, 162, 205, 216-219, 222-225, 233-234) and one (Employee Leonard) testified that he had joined the Union on January 23 (R. 20; 115). Accordingly, the Board found that at the critical time in question the Union had been designated bargaining representative by a majority of 15 out of the 28 employees in the unit (R. 20).

Respondent's claim that the Union's majority was not proved is based solely on its contention that the signature on Employee Malstrom's designation card was not properly identified when the card was received in evidence (R. 129).<sup>19</sup> Upon the undisputed facts relating to the circumstances of Malstrom's signing of the card, we submit, this objection is

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<sup>18</sup> The Board found that the appropriate bargaining unit consisted of all of respondent's employees, excluding supervisors, salesmen, office and clerical employees, professional employees, and guards (R. 18).

<sup>19</sup> The claim that Foreman Ogen was not a supervisory employee and therefore should have been included in the unit is immaterial. Increasing the number of employees in the unit to 29, by including Ogen, would not have affected the Union's majority of 15 employees.

patently frivolous. On the morning of January 31, at the same time Shop Steward Leonard gave Employee Sciolora a card and asked him to sign and return it, he gave a card to Malstrom (R. 126, 128). A little while later the same morning both Sciolora and Malstrom handed the signed cards back to Leonard (R. 126, 128-129). Sciolora testified that he had signed his card (R. 298). In these circumstances, the fact that Malstrom was not called to testify at all, and that his signature on the card was never formally identified, affords no basis for attacking the Board's finding that he, as well as Sciolora, designated the Union as his bargaining representative. The very fact that he promptly returned the card to the shop steward with his name written on it warrants the inference that the signature was his own. And even apart from this, Malstrom's action in returning the card bearing his ostensible signature clearly evidenced his intent to have the Union represent him. The Act "requires no specific form of authority to bargain collectively \* \* \* Authority may be given by action as well as in words \* \* \* not form, but intent, is the essential thing \* \* \* It is only necessary that it be manifested in some manner capable of proof, whether by behavior or language." *Lebanon Steel Foundary Co. v. N. L. R. B.*, 130 F. 2d 404, 407 (C. A. D. C.).<sup>20</sup>

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<sup>20</sup> It was not necessary that Malstrom should have signed the card. If he did not actually sign it, it is clear that he adopted the signature as he had full power to do. Wigmore, *Evidence*, 3d Ed., Sec. 2134; *Restatement of the Law of Agency*, Secs. 17, 20, 82, 84. *Brezner Tanning Co.*, 50 N. L. R. B. 894, 904, enforced, 141 F. 2d 62 (C. A. 1).



### B. Respondent's unlawful refusal to bargain

Since the Union had been duly designated as their bargaining representative by a majority of respondent's employees, it follows that respondent's conceded refusal to bargain with the Union (*supra*, pp. 3-7), unless excused by other circumstances, was in violation of Section 8 (a) (5) of the Act as the Board found (R. 60-62). The only defenses suggested by respondent are that it doubted that its operations were subject to the Board's jurisdiction, and doubted that the Union actually represented a majority of its employees (R. 61-62). These, we submit, the Board properly rejected (*ibid.*).

It goes without saying, we believe, that respondent's doubt as to the Board's jurisdiction is immaterial to the question of respondent's responsibility for its conduct. Respondent's unquestioned right to litigate the jurisdictional issue did not include a license to violate the statute. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42-43; *May Department Stores Co. v. N. L. R. B.*, 326 U. S. 376, 388-392.

With respect to the contention that respondent refused to recognize the Union because it doubted the Union's majority, the record conclusively supports the Board's finding to the contrary (R. 61-62).<sup>21</sup>

---

<sup>21</sup> The Board recognizes, of course, that an employer may refuse recognition and insist upon an election when he actually has an honest doubt as to the union's majority status. *W. T. Grant Company*, 94 NLRB No. 145, pending in this Court on Board's petition for enforcement, No. 13133; *Sport Specialty Shoemakers, Inc.*, 77 NLRB 1011, 1012-1013; *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914.



As we have seen (*supra*, pp. 4-7), respondent did not merely refuse the Union's request for recognition and bargaining, but deliberately undertook a campaign of coercive unfair labor practices in order to eliminate any obligation to bargain by destroying the Union's support. Thus respondent questioned employees concerning their union membership and activity, threatened to discharge Union supporters, promised rewards to employees who would reject the Union, declared that it would never bargain or contract with the Union unless forced by a strike to do so (*supra*, pp. 4-7), and giving substance to its earlier threats finally discharged Shop Steward Leonard because of his Union activity, (*supra*, pp. 7-11; *infra*, pp. 22-25). In addition to all this respondent made clear that it had no qualms about risking a violation of the Act, when it declared that it would in fact do so deliberately, if necessary, in order to provide a case to test in the courts the issue of the Board's jurisdiction (*supra*, p. 6).

In our view, it would be difficult to conceive a case that would afford more compelling evidentiary support for a finding that the employer, in refusing to bargain, was not acting from a good faith doubt of the union's majority.<sup>22</sup> The Board could scarcely

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<sup>22</sup> The Board noted also that Attorney Potruch in his remarks to the employees in the spring of 1950, indicated a realization of the Union's majority support, when he reproached them for affiliating with the Union, but said that they "had gone too far" at that point "to do [their] own talking; that they had selected voluntarily somebody to represent them and that person would do all their talking for them at any time they wanted to" (R.

have concluded otherwise than that respondent's "refusal to recognize the Union on February 1, 1950, and thereafter, was motivated by a desire to gain time in which to destroy the Union's majority, and by a rejection of the collective-bargaining principle" (R. 62). Cf. *N. L. R. B. v. Biles-Coleman Lumber Co.*, 98 F. 2d 18, 22 (C. A. 9); *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914; *N. L. R. B. v. Star Beef Co.*, decided December 15, 1951 (C. A. 1), 29 LRRM 2190, 2194; *N. L. R. B. v. Everett Van Kleeck & Co., Inc.*, 189 F. 2d 516 (C. A. 2).

### III

**Substantial evidence supports the Board's finding that respondent discharged Employee Leonard because of his activities in behalf of the Union, in violation of Section 8 (a) (3) and (1) of the Act**

As shown in the statement of facts (*supra*, pp. 3-11), Leonard, the leading Union advocate among respondent's employees, joined the Union at the outset of its organizing campaign and was elected shop steward on January 30. Two months later he was discharged allegedly for economic reasons, which the

---

62; 270-271, 277-278). The Board and trial examiner, crediting the contrary testimony of other witnesses (R. 33-37, 55; 305-310), did not credit Potruch's testimony that he stated at an informal meeting of Board and Union representatives, held in February and relating to another case, that he did not believe the Union had a majority (R. 37; 304-305). The question of the Union's proof of its majority never arose. At the February meeting referred to, the parties did not even discuss the Howell case (R. 35-36; 305-309). Cf. *N. L. R. B. v. State Center Warehouse Co.*, decided November 27, 1951 (C. A. 9), 29 LRRM 2209, 2210.

Board found to be a patently manufactured pretext. During that two month interval respondent engaged in an outright campaign of particularly coercive unfair labor practices, including threats of discharge and promises of reward, all designed to destroy the Union's majority and eliminate respondent's statutory obligation to bargain with it. Not only were threats of discharge made to the employees generally, but when Foreman Ogen saw Leonard wearing his Union button in the shop he warned Leonard to "get away from him with that button on" because "he didn't want to get fired," and added that President Howell had said that he was going to fire anyone who joined the Union. In addition to this familiar type of threat, respondent made the extraordinary declaration to its employees that it might find it necessary to discharge an employee in violation of the Act in order to provide a test case on the question of the Board's jurisdiction.

When against this background of open antiunionism respondent discharged Leonard for a stated reason which "did not stand up under scrutiny" (*N. L. R. B. v. J. G. Boswell Co.*, 136 F. 2d 585, 595 (C. A. 9)), the conclusion that respondent's threats were prophetic, and the discharge simply a facet of respondent's attack upon the Union, was little short of inevitable.

As the Board found, soon after Leonard assumed leadership of the Union's campaign respondent began to divert the brake adjustment work customarily done by Leonard to other employees who regularly



operated the lubrication rack, a different type of work. Then, citing Leonard's reduced earnings, respondent declared that since there was not enough work for both the brake man and the front end man to earn a living, it had decided to combine the two jobs into one and give it to Herrick, the front end man, who had less seniority than Leonard. When Leonard protested against this departure from seniority and declared that he could also do front end work, Service Manager Bordeau offered no explanation, but simply said "that is the way it is to be" (*supra*, p. 11).

Respondent contended before the Board that it did not consider Leonard qualified to do front end work or interested in handling it, claiming that he had at times refused requests to do such work (*supra*, p. 11). But the contention is baseless. The record shows that Leonard was not only an all around able mechanic with 25 years of experience, but that he had repeatedly done front end work for respondent as well as for other employers. Moreover, on the occasions referred to by respondent, the only reason Leonard had turned down the front end work offered to him was that he was too busy with other work to handle it. And at the time of his discharge, as we have seen, Leonard expressly declared his willingness and capacity to do front end work.

If more were needed to demonstrate that respondent's discharge of Leonard was not based upon economic necessity, it is revealed in the fact that soon after his discharge Herrick's earnings at the combined job nearly doubled (*supra*, p. 11). More-



over, when Herrick on three or four occasions needed extra help to handle the work, respondent did not recall Leonard but employed outside help. Respondent's claim that it did so because it did not know how to reach Leonard was reasonably rejected by the Board since, during the period in question, Leonard visited the shop several times, and on one such occasion was even ordered off the premises by President Howell.

We submit that the evidence in support of the Board's finding that Leonard was discharged because of his activity in behalf of the Union, and in violation of Section 8 (a) (3) of the Act, is more than sufficient.

#### CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue enforcing the order in full.

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JANUARY 1952.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*), are as follows:

### DEFINITIONS

#### SEC. 2. When used in this Act—

\* \* \* \* \*

(3) The term “employee” shall include any employee \* \* \* but shall not include \* \* \* or any individual having the status of an independent contractor, \* \* \*

\* \* \* \* \*

(11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

\* \* \* \* \*

### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the

right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

#### UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

\* \* \* \* \*

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: \* \* \*

\* \* \* \* \*

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

\* \* \* \* \*

#### REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: \* \* \*

\* \* \* \* \*

#### PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person

from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. \* \* \*

(c) \* \* \* If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act \* \* \*

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such



temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. \* \* \*



No. 13140.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

HOWELL CHEVROLET COMPANY,

*Respondent.*

---

## BRIEF FOR RESPONDENT.

On Petition for Enforcement of an Order of the National  
Labor Relations Board.

---

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

HOWELL CHEVROLET COMPANY,

*Respondent.*

---

## BRIEF FOR RESPONDENT.

---

This case is before the court upon a petition for the enforcement of an order of the National Labor Relations Board. The order is dated July 23, 1951, and the National Labor Relations Board invokes the jurisdiction of this court under the provisions of Section 10(e) of the National Labor Relations Act.<sup>1</sup> The Board's order is purportedly issued under the provisions of Section 10 of that Act.<sup>2</sup> Respondent does not contest the jurisdiction of the court to review and decide the matters presented by the petition and answer of the respondent filed herein.<sup>3</sup> The Board's decision and order, upon which these proceedings are predicated, is reported in 95 NLRB No. 62.

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<sup>1</sup>61 Stat. 136, 29 U.S.C. Supp. IV, 160 (e).

<sup>2</sup>61 Stat. 136, 29 U.S.C. Supp. IV 160.

<sup>3</sup>The pertinent portion of the National Labor Relations Act, as amended, are set forth in an appendix, *infra*.

## Statement of the Case.

Upon charges filed by the International Association of Machinists, a labor organization, the Board, after the usual proceedings, issued a decision and order in which it found that respondent had engaged in interference, restraint, and coercion of its employees, in violation of Section 8 (a) (1) of the Act; had discharged one Claude Leonard, in violation of Section 8(a)(3) of the Act; had refused to bargain collectively with the charging union as an exclusive representative of respondent's employees, in violation of Section 8(a)(5) of the Act and had, by its unfair labor practices, necessitated the setting aside of an election, held by the Board, in which the employees of respondent had renounced the union as their exclusive bargaining representative.<sup>4</sup> [R. 12.]<sup>5</sup>

### Early History of Union's Organizing Efforts.

Sometime in January, 1950, the International Association of Machinists initiated its attempts to secure membership among the employees of the respondent. As a part of such attempts it conducted a meeting which was attended by approximately eight of respondent's 29 employees [R. 115-116, 101-102]. This meeting was held on January 30, 1950, at the Local Hall of the charging Union [R. 115]. While the record is not clear, one Claude Leonard,

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<sup>4</sup>For the convenience of the court we shall follow the same method of record citations as adopted by the Board in its brief.

<sup>5</sup>Although the election and the procedures thereunder are the subject of a different case, the Board has failed to certify to the court the record in that representation proceeding. (See 61 Stat. 136, 29 U.S.C. Supp. IV, 159(d).) No reason is given by the Board in its Petition for Enforcement, its Certification of the Record before the Board nor in its brief why it has failed to follow the statute in this respect.



at or about that time became “shop steward or senior chairman” by a vote of the employees [R. 115]. Just which of the employees or how many participated in such selection is not revealed by the record.

By January 30, 1950, eight of the 29 employees had selected the union as their bargaining agent [R. 117, 119, 162, 216, 218, 219, 222, 114]. Sometime during January 31, 1950, six more employees signed cards designating the union<sup>6</sup> [R. 122, 124, 127, 205, 225, 233].

Under date of January 31 1950, the Union forwarded to respondent a letter, in which it claimed to be the majority representative of respondent's employees, but there is no indication in the record whether this letter was written before or after the cards were signed on January 31, 1950 [R. 214-215]. Respondent received this letter on February 1, 1950, but did not answer it because, respondent, in good faith, doubted the union's majority claim [R. 216, 304-305]. On the same date the union filed with the 21st Regional Office of the Board, at Los Angeles, its petition requesting that it be certified as the bargaining representative of respondent's employees. As a result of this petition, an election was held by the Board, the employees voting 13 against designating the union as the bargaining agent, 11 were cast in favor of the union and 2 ballots were challenged (89 NLRB No. 142) [R. 12]. The results of this election were set aside in the decision and order here under review [R. 63], such action is here being contested by respondent.

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<sup>6</sup>There was introduced into evidence, over the objection of respondent, a card purporting to be a designation of L. A. Malstrom, an employee, but there was no evidence introduced to show that in fact Malstrom had signed it. This card bore the date of January 31, 1950. [R. 130.]

On the morning of January 31, 1950, employees Lee Fitzhugh, George Kirkland, William Barnum, Phillip Caballero, Kenneth Herrick and Claude Leonard all appeared at work wearing union buttons [R. 121, 251].

### **The Purported Statements of Frank Ogan.**

Frank Ogan, a body shop employee of respondent, had a conversation with another body shop employee named Arnold, a few days after the employees first appeared wearing the union buttons. Arnold asked Ogan what he thought of the "guys" going union and Ogan replied that they had better watch out because Howell (the company president) was going to fire all of them that "are wearing buttons." Ogan did not say where he had obtained this bit of information [R. 204-206]. Arnold admittedly was merely soliciting Ogan's private opinion [R. 208], and understood Ogan's statement to be no more than a discussion of the question between fellow employees.

Leonard, a mechanic and an employee who did not work with Ogan, visited the latter several days later wearing his union button and Ogan jokingly told him "to get away" with that button on because he didn't want to be "fired." Leonard was simply seeking, from a fellow employee, the source of the conversation had between Ogan and Arnold [R. 131]. Ogan purportedly told Leonard that Howell had told him that "he was going to fire anybody that joined the union" [R. 131, 236]. Ogan repeated these remarks to Leonard and George Kirkland later [R. 163-164]. During a conversation with another fellow employee of the body shop Ogan expressed his personal opinion that he would not have a union man working for him, and that he had never worked in a union shop [R. 194-196].

## The Speeches of Frederick A. Potruch.

In order that the employees might understand the legal implications with which respondent was confronted by the petition for certification which had been filed by the union, respondent had its attorney Frederick A. Potruch make some remarks with respect to such legal considerations.

Potruch opened his remarks by stating that it was his opinion that the National Labor Relations Act did not apply to the business of respondent because of the nature of respondent's business and the localness of the enterprise, hence, it was his opinion that the Board did not have jurisdiction to hear and determine the representation petition which had been filed by the union [R. 272-273]. At this time no disposition of that proceeding had been made by the Board, nor was there any indication that the Board would direct that an election be held among respondent's employees (89 NLRB No. 142). His remarks were merely a recitation of the position the respondent had taken with respect to the Board's jurisdiction, both formally and informally on the representation petition, and since this was his opinion with respect to the Board's jurisdiction the representation petition would have to be dismissed [R. 272-273].

Mr. Potruch then clearly outlined the necessary steps in a representation proceeding and set forth the statutory scheme by which a Board determination in a representation matter could be tested judicially [R. 273-275].

Potruch outlined to the employees various types of strikes and the obligations and rights of an employer during such upheavals [R. 275-276].

Potruch further made it clear, that during the pendency of the proceedings before the Board, respondent could not



make any changes in the wages or working conditions for fear of engaging in violations of the National Labor Relations Act, and assured the men that no one was to be discharged or in any way discriminated against because of any union activities [R. 276-277]. The employees were likewise assured that respondent had no animosity against the union; that they had a right to join or not to join any union of their choice and that the respondent would do nothing to discourage such free choices as they may make [R. 278].

Later, after the Board had directed an election to be held, Potruch met with the employees, in a further series of meetings which in substance were merely explanations of methods of marking ballots and a description of the way the election would be conducted by agents of the Board [R. 278-281]. The remarks were held by the Board to be lawful [R. 59].

### **The Discharge of Claude Leonard.**

Claude Leonard was employed by respondent, in the mechanical repair department as a "brake man"—the duties of this position consisting of making repairs to the braking mechanism of the automobiles of customers of respondents [R. 151-152]. Also, employed in the same department was Kenneth Herrick<sup>7</sup> whose job was known as a "front end and frame straightening" man and whose duties entailed the alignment of the front wheels and the installation of components together with straightening and repairing bent frames of automobiles, to correct such de-

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<sup>7</sup>Both Leonard and Herrick were union adherents and both wore their union buttons while on duty. These buttons were in plain view and were observed by respondent's supervisors. [R. 287.]



ficiencies [R. 285]. Leonard's duties were performed in a "stall" where certain machinery incident to his work was maintained. Herrick performed his duties at a different location, in the shop, where he also maintained certain mechanical equipment used in his work [R. 286]. Both men were compensated from commissions on work performed.

Beginning with the first of the year 1950, and up to the time of Leonard's dismissal, the work for which he was employed steadily decreased, as did the work of the "front end" man and other mechanics [R. 253, 136]. Because of this economic condition, respondent decided to combine these two jobs in order to afford one of these employees substantially full time compensation.

Admittedly Leonard *knew nothing about the work of the frame straightening machine*,<sup>8</sup> a complicated operation [R. 160], and in the opinion of respondent's officers, Herrick was as good a "brake man" as Leonard, if not better. While Leonard had done some "front end" work for respondent, he had expressed his dislike for that kind of work and on at least one occasion had refused to perform "front end" work which the Service Manager had attempted to assign to him [R. 253-254]. Respondent, faced with a choice between *two union men*, elected to re-

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<sup>8</sup>The frame straightening machine is composed of a series of headings, beams and tracks. Pressure is applied to the part of the frame that has been bent and has to be straightened out. This pressure is applied by a series of hydraulic jacks. The job requires the use of tracking gauges set under the car to align the car to tell whether it is in true line or not. Check of alignment is also made by using a "criss-cross" tape. A tracking gauge has a steel tape inside which measures the "sag" on the frame to determine the use of pressure by hydraulics, necessary to correct alignments. [For a more detailed description of this operation see original transcript 376-378.]

tain Herrick, because of his superior experience and qualifications and to dismiss Leonard. Leonard was discharged on March 21, 1950, and no person was employed to take his place.

The mechanical equipment, used by Leonard, was moved to the area where Herrick performed his work, and the space that was occupied by Leonard and his equipment was converted into the use of a "line mechanic."<sup>9</sup>

### Summary of Argument.

It is the position of respondent, to be developed hereinafter, that the petition of the National Labor Relations Board for the enforcement of its purported order, issued against respondent on July 23, 1951, should be denied for the following reasons: (a) the findings, conclusions and order of the Board are not supported by substantial evidence on the record considered as a whole; (b) that because of the bias of the Trial Examiner, respondent was not afforded a fair trial and was denied due process of law; (c) that the Board acted improperly and committed reversible error in ruling that an election held by the Board among respondent's employees on June 1, 1950, should be set aside and (d) that respondent is not engaged in a business covered by the National Labor Relations Act, and hence beyond the jurisdiction of the National Labor Relations Board.

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<sup>9</sup>A line mechanic is one who works principally on motor repairs, transmissions and other mechanisms which motivate the vehicle.

## Questions Presented.

The basic questions here presented by respondent are:

1. Whether respondent is engaged in a business affecting commerce within the meaning of the National Labor Relations Act and whether the National Labor Relations Board has jurisdiction over respondent.
2. Whether respondent was afforded a fair hearing before an impartial Trial Examiner and whether respondent was afforded due process of law.
3. Whether the Board findings of fact and conclusions of law that respondent has interfered with,—restrained and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, are supported by substantial evidence on the record considered as a whole.
4. Whether the Board's findings of fact and conclusions of law that respondent discriminatorily discharged Claude Leonard in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, are supported by substantial evidence on the record considered as a whole.
5. Whether the Board's findings of fact and conclusions of law that respondent refused to bargain collectively in violation of Section 8(2)(5) of the National Labor Relations Acts, as amended, are supported by substantial evidence on the record considered as a whole.
6. Whether the Board acted properly and justly in setting aside an election, which demonstrated that respondent's employees did not desire to be represented by the charging union, for the purposes of collective bargaining.

## ARGUMENT.

### POINT I.

#### Respondent Is Not Subject to the Jurisdiction of the National Labor Relations Board Under the National Labor Relations Act.

During 1949 respondent purchased new cars, parts and accessories in the amount of \$1,089,942.98, from the Chevrolet Division of General Motors Corporation at Van Nuys, California. All of the cars purchased were assembled and manufactured in California and no sales were made outside of that state. No purchase of any kind were made from any sources outside of California. Respondent operates under a non-exclusive agreement with General Motors Corporation to sell Chevrolet cars and trucks. At least 57% of the components of these purchases originated within the state of California. Contrary to the findings of the Board, General Motors exercises no managerial control over the operations of respondent's business.

The Board relies chiefly upon this court's decision in *NLRB v. Townsend*, 185 F. 2d 378, to support its findings that respondent is covered by the Act but that case, as the court well knows, was decided upon a different state of facts. In the *Townsend* case, all of the automobiles involved were actually manufactured and assembled outside of the state of California. Those vehicles came into this state in a completed form, whereas in the instant matter the assembling and manufacture is a California operation and the products are all sold within this state. (Cf., *NLRB v. Ken Rose Motors, Inc.*, Board's brief page 2; *NLRB v. Conover Motors*, 29 LRRM 2045 (Cal.); *NLRB v. Davis Motors, Inc.*, 29 LRRM 2046.)



It is clear from the evidence in the record that the business of respondent is local and is not covered by the provisions of the National Labor Relations Act, as amended.

## POINT II.

### **The Board's Findings That Respondent Interfered With, Restrained and Coerced Its Employees in Violation of Section 8(a)(1) of the Act Are Not Supported by Substantial Evidence on the Record Considered as a Whole.**

The evidence upon which the Board relies to sustain its findings that respondent has interfered with, restrained and coerced its employees in violation of Section 8(a)(1) stems principally from talks made to the employees by respondent's attorney, and from purported statements of Jackson Howell (respondent's president), Rowland Bordeau (respondent's service manager), and Frank Ogan, an employee who worked in respondent's body shop.

#### **1. The Talks of Frederick A. Potruch.**

It is respectfully submitted that none of the remarks of Mr. Potruch made to the employees can honestly and fairly be said to constitute unfair labor practices. Expressions of opinion, legal or otherwise, arguments and views are now completely protected by Section 8(c) of the Act, where, as here, there is such a marked absence of threats of reprisals or promises of benefit<sup>10</sup> and such views, argument or opinions "*shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . .*"

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<sup>10</sup>61 Stat. 136, 29 U.S.C., Supp. IV, Sec. 158(c).

Employers and their agents are now free to express their views. They may even give arguments for or against labor organizations, or the advisability of their employees joining a labor organization. Employers may express in no uncertain terms their opinion, arguments and views that the employees would be better off without a union than with one, or that the union would be unable to fulfill its promises, even though the employees may have selected a bargaining agent. Even the fact that the employer may have a deep seated animosity against the union does not in and of itself justify the finding of an act of violation.<sup>11</sup>

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<sup>11</sup>The following situations have been held by the Board to be protected by Section 8(c) as freedom of speech expressions: Arguments against a check-off and union shop, *Hinde Dauch Paper Co.*, 78 NLRB 488; notice to employees that employer did not intend to bargain with certified union because it felt NLRB decision was wrong, *S. W. Evans & Sons*, 81 NLRB 161; permitting employer's truck to participate in a parade celebrating the defeat of a union in an election, *Cedartown Yarns Mills Inc.*, 84 NLRB 1; letter to employees to enlighten them and mark comparisons with other unionized plans, *Solomon Co.*, 84 NLRB 226; calling union leaders "communists," *Globe Wireless Ltd.*, 88 NLRB 211; notice to employees that their interest would be best served by a vote against the union, *Wrought Iron Range Co.*, 77 NLRB 487; profane characterization of union leaders, vilifying and disparaging the union, *Atlantic Stages*, 78 NLRB 553; that employer was going to do everything he could to fight the union coming into the plant, *Burns Brick Co.*, 80 NLRB 389; statement that G I bill provided that employees did not have to join union for a year, *Texas Co.*, 80 NLRB 862; request to vote against the union and to persuade others from voting for the union, *Tennessee Coach Co.*, 84 NLRB 703; speech to employees expressing antipathy toward the union, *Babcock & Wilcox*, 77 NLRB 577; speech to employees that the union could not obtain advantages for the employees and that only the employer could grant benefits, *Dixie Shirt Co.*; appeals to "the intelligence" of the employees to vote against the union, *Cookeville Shirt Co.*, 79 NLRB 667; stating a preference of operating without a union, *Chance Vought Div.*, 85 NLRB 183; expressions of desire to continue to deal with the employees directly, *H & H Mfg. Co.*, 87 NLRB 1333; employer's attorney told employees they have a good place to work but you don't appreciate it and the company can replace you and that the company was not going to be forced to do something it didn't want to do, *Crowley Milk Co.*, 88 NLRB 187.

(*NLRB v. O'Keefe & Merrit Mfg. Co.*, ..... F. 2d ..... (C.A. 9); *Enid Cooperative Creamery Assn.*, 169 F. 2d 986 (C.A. 10); *NLRB v. Electric City Dyeing Co.*, 178 F. 2d 980; *Sax v. NLRB*, 171 F. 2d 769 (C.A. 7); *NLRB v. Sidran Sportswear Co.*, 181 F. 2d 671 (C.A. 5); *NLRB v. Goodyear Footwear Corp.*, 186 F. 2d 913 (C. A. 6).)

An impartial and fair examination of the statements of Potruch glaringly portray the lack of any threat of reprisals or promises of benefits. Rather they constitute an honest and clear exposition of the legal principles involved and the rights of the respondent in the light of those clear legal precepts.

In these statements the employees are assured of their rights to join or not to join a union and were equally and forcibly assured that respondent would do nothing to interfere with the exercise of any choice they would make [R. 278, 173]. They were assured that nothing will happen to their jobs, that none would be discharged because of their participation in the union movement and that no change would be made in working conditions or wages [R. 476, 477, 173]. Potruch flatly stated that to do any of these things might entail a charge of an unfair labor practice and that the respondent did not intend to commit any unfair labor practice [R. 277]. It would be difficult to conceive language which would give to the employees a fairer explanation of their rights and the respect that respondent intended to afford the exercise of those rights. The only promises that Potruch gave the employees was that their respective rights would be jealously guarded and maintained.

With respect to the statements of Potruch as to steps that could be taken to test any portion of a representation proceedings, they are statutorily sound. Even the Board



concedes this [R. 58]. Mr. Potruch cannot be blamed for the involved mechanics of the statute for testing such subjects. The Congress and the courts have established that mechanism, not Mr. Potruch. All Potruch did was to fairly outline these various steps and point to the possibility that they might be utilized. Such a fair exposé of the law on the subject cannot be held to contain any threats or promises and surely respondent is not foreclosed from considering and discussing the advisability of following the law.

In this legal discussion and as the only available statutory step for testing the validity of a representation determination Potruch said:

“I said that it might even—*I didn’t say it would be, but it might even necessitate*—that for any company, *not necessarily Howell*, to get a case into the United States Circuit Court of Appeals, it might be necessary to do something to be cited for an unfair act under the National Labor Relations Act, that someone might have to be discharged and then a charge brought. *It didn’t have to be Howell; it could be somebody else. I only used that as an example.* (Emphasis added.)

“And then they would have a hearing on it . . . and that after a ruling was handed down, if it was unfavorable, then the company would have the right to appeal to the United States Circuit Court of Appeals; if the Trial Examiner was to rule against the company and then the Board in Washington ruled against us on jurisdiction, that we would have to take certain procedures to appeal to the Circuit Court of Appeals.

\* \* \* \* \*



“I told them it was possible to get a case up to the Supreme Court with the proper set of facts and have the highest court in the land test the question of jurisdiction.” [R. 274.]

This is manifestly a fair and honest recitation of the complicated statutory machinery.<sup>12</sup>

Further, in a discussion of strikes and their attendant ramifications, respondent is not prohibited from giving its views on the legal as well as the economic aspects of such activities. The fact that replacement is legally possible in an economic strike is not an invention of respondent—it is a proclamation of the Supreme Court of the United States. (*MacKay Radio Corp. v. NLRB*, 304 U. S. 33.) That doctrine, so established, has been repeatedly followed by this and other courts. It is likewise settled law that employees engaged in an unfair labor practice strike cannot be legally replaced—that also is not an invention of respondent. What Potruch said about this type of strike was nothing more nor less than what this and other courts have been saying for many years. Such a repetition of these holdings can in no way be coercive or reveal any threats of reprisals or promises of benefits to the employees. (*American Tube Bending Corp. v. NLRB*, 134 F. 2d 993 (C.A. 2), cert. den. 320 U. S. 768; *Big Lake Oil Co. v. NLRB*, 145 F. 2d 967. Compare *NLRB v. Ford Motor Co.*, 114 F. 2d 905-914 (C.A. 6); *Thomas v. Collins*, 323 U. S. 516.)

Finally, to bolster an obvious failure to prove by substantial evidence anything violative of Potruch's remarks,

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<sup>12</sup>61 Stat. 136, 29 U.S.C., Supp. IV, Sec. 159(d).

the Board points to two isolated statements as revealing a sinister purpose in all of these remarks. General Counsel's witness Kirkland testified, "that Mr. Potruch said that there would be no changes in working conditions unless the company asked the union . . . and by God we won't do that" [R. 172-173, 276, 175-176]. Potruch denied making this statement [R. 281]. The Board has prejudicially and erroneously resolved the credibility in favor of Kirkland over an accredited officer of this court. Fifteen of respondent's employees attended and heard the remarks of Potruch. Only Kirkland testified that Potruch made this remark. The fact that fourteen of the witnesses, who were present, did not corroborate Kirkland is completely disregarded and a witness with a proven animus is believed over an officer of this court. Such a tenuous resolution of credibility should not be condoned by this court. (*Universal Camera Corp. v. NLRB*, 340 U. S. 474; *NLRB v. Pittsburgh S. S. Co.*, 340 U. S. 489; *NLRB v. Universal Camera Co.*, 190 F. 2d 429.) It is apparent, on the record considered as a whole, that Potruch did not make this remark. But even if made, the remark does not contravene the act because Potruch was only saying that he would not consult with the union until the majority status of the union was established by the Board.

Another bit of testimony taken by the Board out of context and magnified out of proportion, is the testimony of George Smith that, during the second series of meetings, Potruch said "there would be a new deal after the first of the month" [R. 201]. Here again, only one of the entire staff attending these meetings gave a disconnected statement which is eagerly grasped and credited over an officer of this court. The Board disregards the further fact that the witness had a marked hostility to

respondent because the latter had discharged him for being drunk on the job [R. 259]. Assuming, *arguendo*, such a statement was made, it did not, according to the Board's decisions amount to an unfair labor practice, because of its ambiguous nature. (*Westinghouse Electric Corp.*, 77 NLRB 1058.)

## 2. The Conduct of Frank Ogan Is Not Imputable to Respondent.

At the outset of the discussion of this phase of the case it is necessary to call the attention of the court to the fact that the Board's General Counsel made no attempt to prove that Ogan was a supervisor within the meaning of the Act, so as to bind respondent by his conduct.

The Act defines a supervisor as:

"Any individual *having authority*, in the interest of the employer, *to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline* other employees, or *responsibility to direct them*, or *to adjust grievances* or *actively to recommend such action*, if in connection with the foregoing the exercise of such authority is *not of a merely routine or clerical nature* but *requires the use of independent judgment*. (61 Stat. 136, 29 U. S. C., Supp. IV, Section 152(11))." (Emphasis added.)

The General Counsel did not even attempt to prove that Ogan possessed any of the above mentioned statutory requirements. That the burden of proof is on the General Counsel is a legal tenet which does not permit argument, and where the evidence fails to show, that a purported supervisor possess one or more of the necessary statutory requisites, such a person cannot be classed as a supervisor



within the meaning of the statutory definition.<sup>13</sup> (*NLRB v. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6) (1950); *E. B. Law & Son*, 91 NLRB 136.)

It is true that in the record Ogan was referred to as a foreman of the body shop, but he was also referred to as a body man [R. 101]. The mere attachment of the appellation of foreman without proof of the presence of the statutory requisites does not convert Ogan into a supervisor within the congressional definition. (*Endicott Johnson Co.*, *supra*.) All Board decisions, since the advent of the Taft-Hartley Act, dealing with determinations of supervisors have stressed the necessity of the presence of one or more of the types of authority set forth in the act. (See *Sioux City Brewing Co.*, 85 NLRB 194, where it was held that an employee without the authority to hire, discharge or otherwise affect employee status was

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<sup>13</sup>The Senate in reporting its amendment to include a definition of a supervisor clearly laid out its intention to be the drawing of a line between supervisors that are truly management and *minor supervisors having no such connections*. Senate Report No. 105 on S. 1126 said:

"In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that *certain employees with minor supervisory duties have problems which may justify their inclusions in that act*. It has therefore distinguished between *straw-bosses, leadmen, set-up men, and other minor supervisory employees* on the one hand, and the *supervisor vested with genuine management prerogatives as the right to hire or fire, discipline, or make EFFECTIVE recommendations with respect to such action*. In other words the committee has adopted the test which the Board itself has made in numerous cases when it had permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file. *Bethlehem Steel Co.*, 65 NLRB 284 (expeditors); *Pittsburgh Equitable Meter Co.*, 61 NLRB (group leaders with authority to give instructions and to lay out the work); *Richard Chemical Works*, 65 NLRB 14 (supervisors who are mere conduits for transmitting orders); *Endicott Johnson Co.*, 67 NLRB 1342, 1347, (*persons having title of foreman and assistant foreman but with no authority other than to keep production moving*). . . ." (Emphasis added.)



not a supervisor; *Calumet & Hecla Consolidated Copper Co.*, 85 NLRB 28, where employees without the statutory requisites were held not to be supervisors; and gang foreman who does not possess or exercise the power of effective recommendation or responsible direction over a crew, *Warren Petroleum Corp.*, 97 NLRB 226 (January 31, 1952), *ad infinitum.*)

Not only does the record fail to show that Ogan possessed any of the statutory requirements of a supervisor, but the contrary is cogently revealed. Howell testified without contradiction that Ogan was under the supervision of the service manager [R. 90], and Bordeau, the Service Manager testified without contradiction that it was his duty to supervise the body shop [R. 250]. Further the only other evidence of the exercise of any of the statutory requirements, so far as the body shop is concerned was performed, not by Ogan but by Bordeau when he discharged George Smith and another employee for drunkenness on the job [R. 258-259].

In addition to these negations of Ogan's supervisory position, Howell testified without contradiction that when he gave instructions to his supervisory staff that there was to be no partiality shown in any direction, no discrimination, no one was to be fired and that the company's position would remain absolutely neutral Ogan was not included in the supervisory staff [R. 236-237]. As we have heretofore pointed out, Ogan was classed as a body man and so carried on the company's payroll [R. 101].

It is now well settled that an employer is not responsible for the anti-union conduct of its non-supervisory employees. (*NLRB v. McGough Bakeries Corp.*, 153 F. 2d 420 (C. A. 5); *Mylan-Sparta*, 78 NLRB 1144.)

Assuming, for purpose of argument, that Ogan had been proven to be a supervisor, the conduct and statements attributed to him are isolated and do not show that they stem from any source of responsible management. On the contrary, the undisputed and uncontradicted instructions of Howell was *to maintain strict neutrality, that there were to be no discharges or discriminations* which instructions from time to time he personally checked and re-emphasized [R. 236-237]. Under the applicable cases, even though Ogan was a supervisor, such statements not coming from responsible management have been repeatedly held by the courts and the Board not to amount to unfair labor practices. (*NLRB v. Montgomery Ward Co.*, ..... F. 2d ....., 29 LRRM 2041 (C. A. 2); *Sax v. NLRB*, 171 F. 2d 769 (C. A. 7); *NLRB v. Fairmont Creamery Co.*, 144 F. 2d 128 (C. A. 10); *NLRB v. West Ohio Gas Co.*, 172 F. 2d 685 (C. A. 6); *NLRB v. Tennessee Coach Co.*, ..... F. 2d ....., 28 LRRM 2334 (C. A. 6) (1951); *NLRB v. Hinde & Dauche Co.*, 171 F. 2d 240 (C. A. 4); *Jacksonville Paper Co. v. NLRB*, 139 F. 2d 148.)

### 3. The Purported Statements of Jackson Howell.

About two weeks before the election (June 11, 1950), Jackson Howell, president of respondent, and an employee named Ed Daly had a conversation in the body shop. They were later joined by George Smith. During this conversation Daly asked Howell, "How about the union and when are we going to get a raise?" Howell replied, "Ed, I can't talk about it to you. I can't answer your questions because I don't know. You were at the meeting when Potruch spoke, when he said no cuts in salary, no discharges, no increases. So until the matter is disposed of, I am not in a position to answer your questions" [R. 240-242]. Smith arrived during the time that Daly was ask-

ing for the raise and the conversation held between Howell and Daly is the same conversation in which Smith testified that Howell said that if the union was voted out they were going to 50% the first of the month [R. 198-199]. Howell specifically denies that he made any such statement [R. 242] or that he stated to Smith that if the union came in there would be a strike. Two things are significant about this purported conversation and must be taken into consideration since the Board has chosen to believe Smith's version rather than the truthful version of Howell. Daly, with whom the conversation originated, was called as a witness by the General Counsel, but was not asked any questions concerning this conversation and Smith, whom we have shown to be a drunkard with a strong animus towards respondent is unworthy of belief [R. 259]. In resolving the credibility, the Trial Examiner and the Board have deliberately ignored the surrounding facts and conditions. The statement is isolated out of context, and thus considered. Further these findings are wholly inconsistent with the well proved position of respondent, corroborated by all the witnesses, that the respondent's position *of neutrality was not only proclaimed, but was a practiced fact* [R. 171-173, 181-183-187, 241, 289 290, 291-292, 293-294, 297, 298-299, 300-301].

In the same vein is the purported statement of Howell to Boyce Skelton who says he was merely walking along when Howell approached him and without any further to do stated that if the union was defeated everybody would get a raise [R. 227]. Skelton did not remember anything else that was said, he didn't remember the time and testified that he had not had a previous conversation with Howell. This is another instance where the Trial Examiner and the Board resolved the credibility on tenuous evidence over the strong and honest denial of Howell.



William Hansen after much leading and brow beating by the General Counsel stated that Howell had told him to vote for the company and he would get a raise [R. 208-212], but when Hansen's testimony is read in full text the unreliability of it is inescapable.

Throughout the record there is demonstrated and studied resolve to believe only the witness of the General Counsel and to disbelieve all the witnesses presented by the respondent. Such resolutions of credibility are to be scrutinized carefully by the court in order to insure to respondent the requisites of due process. (*Universal Camera Corp. v. NLRB, supra; NLRB v. Universal Camera Corp., supra.*)

#### 4. The Purported Statement of Rowland Bordeau.

The Board has found that Bordeau, respondent's Service Manager made a statement that if the shop went union Howell would shut his doors [R. 196-197]. This statement was supposed to have been made to Kenneth Herrick, an employee, in the presence of George Smith. The statement was purportedly made at a cocktail bar. Both Herrick and Bordeau denied that such a statement was made [R. 257-258, 287]. In this instance the Board becomes positively ridiculous in the credibility resolution and believes Smith over the actual conversational participants even though Smith testified that *he was not interested in the conversation and that he didn't pay too much attention to it* [R. 197]. These findings are certainly inconsistent with the preponderance of the evidence and the conclusion palpably is that no such statement was made.

Upon this record considered as a whole it is obvious that respondent did not commit any acts that are violative of Section 8(a)(1) of the Act, and that the Board's findings in these respects are not supported by substantial evidence and should be set aside.



### POINT III.

**The Board's Findings That Respondent Discriminatorily Discharged Claude Leonard in Violation of Section 8(a)(3) of the Act Are Not Supported by Substantial Evidence on the Record Considered as a Whole.**

Respondent contends that Claude Leonard was discharged for reasons of lack of sufficient available work. On the other hand, the Board found, and is here insisting that the record fully supports its findings that Leonard was discharged for union membership and activities. The record is silent as to any knowledge by respondent that Leonard engaged in any union activities *except that he like several other employes wore their union buttons while on duty*; in short, the only knowledge respondent had of Leonard's union activities was the fact that he displayed a union button. While the record does show that Leonard was instrumental in obtaining several of the employees signatures to union designation cards, *there is not one iota of evidence that such activities were known by respondent or its officers and agents.*

It must be remembered that Leonard was not the only employee who wore a union button. Seven other employees who attended the union meeting of January 30, 1950, also appeared the next day wearing union buttons and continued to do so throughout the period here involved and none of the seven were in anywise mistreated. In fact, Herrick, to whom the work of Leonard was assigned, attended the same meeting and wore his union button all during the time Leonard was wearing his.

It is apparent that the Board has refused to credit the fact that respondent was unaware of any union activities of Leonard except the button display.

We believe the court cannot overlook the established fact that all respondent knew of Leonard's union activities was the wearing of the button.

"The inference that he was discharged on account of such activities may not be drawn from the fact that the activities preceded the discharge. *Post hoc ergo propter hoc* is not sound logic." (*Tampa Times Co. v. NLRB*, ..... F. 2d ....., 29 LRRM 2288 (C.A. 5), *NLRB v. Cen-Tennial Cotton Gin Co.*, ..... F. 2d ....., 29 LRRM 2289; *Pittsburgh S. S. Co. v. NLRB*, 180 F. 2d 731, *affirmed*, 340 U. S. 489.)

Prior to his dismissal, Leonard was assigned to do the "brake work" while Herrick, also a union adherent and one who wore his union ensign, was assigned the performance of "front-end and frame straightening" work. There is no question but that the amount of available work for these two jobs was decreasing and that neither Leonard nor Herrick was receiving full time compensation.

The decision of respondent to discontinue one of the jobs and combine the work with another, was a decision which respondent could and did lawfully make. The Act does not interfere with the normal exercise of the rights of an employer to govern his working arrangements or to select his employees or to discharge them. (*NLRB v. Jones & Laughlin Steel Co.*, 301 U. S. 1.) It is undisputed that both Howell and Bordeau felt that Herrick was the better of the two men to be given the combined job. They were in part motivated to this decision by the admitted fact that Leonard could not operate the frame straightening machine [R. 160] and that Herrick could. Bordeau had observed and watched the work of both and intimately knew their various qualifications [R. 253]. Bordeau had previously attempted to have Leonard work on "front-

ends,” which work Leonard stated he did not care to do [R. 253-254, 268-269, and 265]. Leonard was told at the time he was discharged it was because he was not a front-end man [R. 269]. The only protest made by Leonard was that he had more seniority than Herrick.<sup>13a</sup>

Respondent not only combined the duties of these two jobs but the equipment of each was moved to the “front end” location, and the space thus vacated was used by the line mechanics. It is undisputed that from the time Leonard was discharged on March 21, 1950, until the time of the hearing in October, 1951, no person had been employed to replace Leonard [R. 287].

The Board and Trial Examiner stresses the point that because Herrick’s compensation nearly doubled, it proves that Leonard’s discharge was discriminatory. There is nothing phenomenal about this. When there are two half jobs and they are combined into one, the fact that two halves equal a whole does not rebut the conclusions that there was insufficient work for two men, but rather sustains the respondent’s position. The increase in compensation under such a combination is a matter of simple arithmetic.<sup>14</sup>

In sum the evidence shows on the side of the Board’s findings only that Leonard wore his union button which was observed by respondent. Conversely, the evidence shows that Leonard’s other activities were unknown to management; that there was good reason to combine the

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<sup>13a</sup>Respondent had never followed any system of seniority with respect to employee status.

<sup>14</sup>Although the complaint alleged that prior to his discharge respondent had discriminated against Leonard by assigning part of his work to others, neither the Board nor the Trial Examiner found this to be a fact.



two jobs; that management's choice between Leonard and Herrick was because of the belief that Herrick was a superior employee; that admittedly Leonard could not perform all of the required functions and Herrick was qualified; that both Herrick and Leonard had been union adherents from the start and both had worn their union buttons while at work; that none of the other union men were in anywise mistreated or discriminated against; that undisputedly respondent's president had issued instructions against discrimination and had checked and rechecked to see that these instructions were carried out; that admittedly the employees were assured by Potruch that there would be none discharged for union activities, and that the employees were assured of their inviolable right to join the union.

The Board is required to bottom its findings on the "preponderance of the testimony taken"<sup>15</sup> and "no order of the Board shall require reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."<sup>16</sup>

The above summation manifestly shows that the evidence preponderates in favor of a discharge for cause. Even though it fails in this, nevertheless the burden of proof is upon the Board to show that the discharge was for union activities, which it has failed to do.

Membership in a union is not a guarantee against discharge and when real grounds exist for discharge, management is not prevented, by union membership or activities from making discharges. (*NLRB v. Fulton Bag &*

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<sup>15</sup>61 Stat. 136, 29 U.S.C., Supp. IV, Sec. 160(c).

<sup>16</sup>*Ibid.*



*Cotton Mills*, 175 F. 2d 675 (C.A. 5); *NLRB v. Clara-Val Packing Co.*, ..... F. 2d ....., 28 LRRM 2579 (C.A. 9); *NLRB v. Tennessee Coach Co.*, *supra*; *NLRB v. Universal Camera* (C.A. 2) (on remand) *supra*.)

The amendment to the Wagner Act was intended to and did give legislative disapproval to practices of the Board whereby it could and did single out one bit of evidence and disregard the rest, in making findings. Now the findings must be supported by the preponderance of the evidence in the record considered as a whole (*Pittsburgh S. S. Co. v. NLRB*, 180 F. 2d 731, *affirmed* 340 U. S. 489; *Universal Camera v. NLRB* (Supreme Court), *supra*.)

Findings of the Board, such as here, may not rest on suspicion and conjecture and inference may not be drawn upon false inferences. (*NLRB v. Ray Smith Transport Co.* (C.A. 5) (Dec. 20, 1951), ..... F. 2d ....., 29 LRRM 2202, 2204-2206.)

The Board seeks to buttress the weakness of its findings with respect to Leonard by attempting to show that the discharge was set in a background of reprehensible anti-union animus. While we have conclusively shown that the statements of the company attorney were privileged, that respondent is not responsible for the act of Ogan and that the resolutions of credibility with respect to the purported acts of Howell and Bordeau were against the weight of the evidence, nevertheless if such acts were violative, they are not conclusive on the discharge of Leonard.

We respectfully submit that the Board has not borne the burden of proof that Leonard's discharge was motivated by his union activities and therefore the finding of a violation of Section 8(a)(3) is not supported by substantial evidence on the record considered as a whole.

#### POINT IV.

### **The Board's Findings That Respondent Has Refused to Bargain in Violation of Section 8(a)(5) Are Not Supported by Substantial Evidence on the Record Considered as a Whole.**

It is axiomatic, in any consideration of a question of refusal to bargain, that the claiming union must represent a majority of the employees in an appropriate unit at the time of the claim. The law is well settled, requiring no citation of authority, that no respondent is required to bargain with a minority union. The evidence here clearly fails to show that at the time, January 31, 1950, when the union made its demand, it possessed the necessary majority designations.

#### **1. The Letter of January 31, 1950, Was Not a Demand Which Respondent Was Required to Comply With.**

Under date of January 31, 1950, the union forwarded a letter to respondent in which it laid claim to a majority and requested collective bargaining [R. 214]. Admittedly only eight employees had chosen the union of January 30, 1950 (*supra*, p. 3). Sometime during the day of January 31, 1950, six more employees signed designation cards (*supra*, p. 3), the exact times of affixing their signatures is not established. Nor is it established at what time of day the letter was written. There is no evidence to show whether the letter was written prior to or after the signing of these cards on January 31, 1950. On this date there were 29 employees in the appropriate unit.

The Board itself has promulgated a rule that in similar situations it would not split a day into fractions, and accordingly has held that no proper demand for bargaining had been made and dismissed a charge of refusal to bar-

gain. (*Brezner Tanning Co., Inc.*, 50 NLRB 894, *affirmed NLRB v. Brezner Tanning Co.*, 141 F. 2d 62 (C. A. 1).) It could only be, on the posture of this record, a matter of conjecture as to whether, at the time the letter was written, the union had received the additional designations of January 31, 1950. The statute does not permit the drawing of inferences upon mere conjecture. Further, when the employees were given an opportunity to express their desires by secret ballot, it was conclusively shown they did not wish to be represented by this union. In the face of this evidence, we believe the court must consider the letter to be without probative value and since no valid demand was given to respondent, it was under no legal duty to reply or acquiesce.

## **2. The Record Fails to Show the Majority Status of the Union at Any Time.**

On January 31, 1950, there were 29 employees in the appropriate unit<sup>17</sup> [R. 101-102].

For the purposes of calculation, the Board and the Trial Examiner excluded from this number Frank Ogan, on the ground that he was a supervisor within the meaning of the Act. We have conclusively shown this exclusion to be erroneous (*supra*, pp. 17 to 20).

Even though we are incorrect in our position with respect to Ogan, the record still fails to prove, by probative evidence that the union had a demonstrable majority.

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<sup>17</sup>The Trial Examiner found and the Board adopted his findings that all the respondent's employees, excluding salesmen, office and clerical employees, professional employees, guards, and supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. [R. 47.] Respondent does not contest this finding.



General Counsel's Exhibits 11, 12, 13, 14, 15, 16, 18, 20, 26, 31, 32, 35, 36 and 37 [R. 117, 119, 122, 124, 128, 130, 162, 205, 219, 218, 222, 225, 233] are authorization cards purportedly signed on or before January 31, 1950. In addition Leonard had joined the union previous to that time [R. 114]. Thus, the Board reaches the conclusion that 15 of 28 persons had designated the union on or before January 31, 1950. One of these cards [General Counsel's Ex. 16, R. 130] was purportedly that of one L. A. Malstrom. However, the testimony failed to show that Malstrom had actually signed such card [R. 128-129]. Malstrom was not called to identify or authenticate this card and the record reveals no reason why he could not have been called for such purpose. This card was admitted over the vigorous objections of respondent [R. 129] which contended there was no testimony to prove the authenticity of the card. We submit that the record is insufficient to show that this card was a designation of Malstrom and amounted to only uncorroborated hearsay and of no probative value in the calculation of the union's majority. (*Consolidated Edison Co. v. NLRB*, 305 U. S. 197.)

Since it was improper to count Malstrom's card in the valid designations, the proven number of employees to designate the union is reduced to 14, which is not a majority of 28.

It therefore follows the General Counsel has failed to prove by substantial evidence that the union was ever the majority representative. Respondent was at no time required by the statute to recognize and bargain collectively with the union. (*NLRB v. Jones & Laughlin Steel Co.*, *supra*.)



In addition to these considerations, respondent promptly upon receipt of the union's claim of exclusive representation, denied in good faith and questioned the union's majority claim [R. 304-305]. It is undisputed that the union, at no time, proffered to respondent any proof to support the claim of majority [R. 310].

## POINT V.

### **The Board Acted Improperly and Unjustly in Setting Aside the Election in Which Respondent's Employees Demonstrated That They Did Not Desire to Be Represented by the Union for the Purposes of Collective Bargaining.**

As we have shown in Points II, III and IV, that respondent has not interfered with, restrained or coerced its employees, in violation of Section 8(a)(1), that it has not discriminated against Claude Leonard, in violation of Section 8(a)(3) and that it had not refused to bargain in violation of Section 8(a)(5). The record cogently shows that the objections to the conduct of the election are wholly lacking in merit and are insufficient to warrant setting aside the election and its results. Without again setting forth those arguments in detail we incorporate them under this heading.

On January 31, 1950, the union, in addition to writing respondent, filed its petition with the Board for certification. On May 5, 1950, after an investigation and formal hearing the Board issued its decision in which it found that a question of representation existed and directed an election to resolve that question. 89 NLRB No. 142 [R. 12]. Thereafter on June 1, 1950, an election was held in which 11 votes were cast for the union; 13 against and two votes were challenged. On June 6, 1950,

the union filed the charges of these proceedings and also filed objections to the election based on the facts alleged in the charges. Meanwhile, respondent was engaged in the conduct alleged to be unfair labor practices.

Thus it appears that, after a full and formal hearing in a representation proceeding, the Board found a **question of representation** existed concerning the employees here involved and directed an election. The effect of findings, a refusal to bargain in this case, is to penalize respondent for having previously arrived at the same conclusion. The union, itself, when it filed its representation petition indicated its conviction that a question of representation existed which ought to be resolved by an election. As evidenced by its support of the petition through the Board's processes of investigation, hearing, election and objection to the election, the union apparently still retains that conviction.

This view is supported by the recent decision in *NLRB v. John Deere Plow Co.*, ..... F. 2d ....., 27 LRRM 2348 (C.A. 5, Feb. 1951). The court there expressly refused to enforce an order to bargain rendered in circumstances similar in essential elements to those appearing here. If any legal doctrine could be said to represent well established Board policy, it is the proposition that so long as there exists a question of representation, there is no legal obligation to bargain.

If after, what the union supposed was a refusal to bargain, the union had one of two courses open to establish officially its status as bargaining agent: It could have filed a refusal to bargain charge or instituted a representation petition. It chose, however, not to wait until Respondent acted upon its letter of January 31, 1950, but filed its representation petition the same day.

Had the union sought the withdrawal of this petition upon the happening of acts which it felt were unlawful, the Board would in all probability have granted the request.

But the union did not do this. Instead it supported its petition through a hearing and an election. During this period, respondent was engaging in the acts alleged to be unfair labor practices. The union certainly knew that respondent had not replied to its letter of January 31, 1950, that Leonard had been discharged and also must have known of the acts alleged to be interference and discrimination. Yet at no time before the election did the union protest these activities or file charges based on them. Rather it chose to await passively the results of the election. Having chosen to participate in such election as a means to establish its bargaining status, the union should not thereafter be allowed to recant and seek to pursue a remedy it previously chose to ignore.

It has long been the firm practice of the Board to suspend the processing of a representation case when a related charge of refusal to bargain is filed. Waivers of unfair labor practices are not accepted in such cases as they are in situations where other unfair labor practices are concerned. This practice is a recognition of the fact that inasmuch as a representation matter and a refusal to bargain proceeding are directed at the same end, it would not be consonant with good administration to allow both to be prosecuted at the same time. In plain English the union is not to be permitted to have

its cake and eat it too.<sup>18</sup> Having confessed that a question of representation existed, by the filing of its representation petition, it clearly sustained the respondent's position that the union had no clear demonstrable majority. To permit the union to recant would constitute a miscarriage of justice.

For these reasons we respectfully submit the Board acted improperly in setting aside the election.

## POINT VI.

### The Respondent Was Not Afforded a Fair Hearing Before an Impartial Trial Examiner and Was Denied Due Process of Law.

This record discloses a hearing conducted with such partiality and unfairness as to amount to a denial of due process. It presents the usual picture of supporting findings arrived at by a process of quite uniformly crediting testimony favorable to the charges and as uniformly discrediting testimony opposed. (*NLRB v. Caroline Mills*, 167c F. 2d 212.) Time and time again, the Trial Examiner took over the examination of the witnesses for the General Counsel and by leading and suggestive questions elicited testimony he wanted in the record in order to bolster the Board's case [R. 104, 105, 106, 108, 112, 113, 115-116, 120, 121, 122, 125, 126, 128, 129, 131, 133, 134-135, 138, 139, 141-142, 142-143, 144-145, 146, 147, 148-149, 153, 154, 155, 155-156,

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<sup>18</sup>As recently as January 30, 1952, the Board held that the failure to file charges of unfair labor practices and an election to proceed in a representation matter, constituted a waiver of such acts as valid objections to an election. *Larsen-Hogue Electric Co.*, 97 NLRB No. 215.



156-158, 179, 192, 194, 197, 199, 202, 207, 210, 216, 244, 272, 228, 233, 267, 268]. Contrast the eagerness with which the Trial Examiner came to the aid of the General Counsel in the examination of his witness with the failure or reluctance of the Trial Examiner to so aid counsel for respondent. It will be noted from these record citations that in no instance at all did the Trial Examiner attempt to obtain any testimony which in any-wise would favor respondent.

The record inescapably shows that the findings and order are without factual or legal basis, and that one of the main reasons that this is so is that the Examiner completely forgot; that, in the hearing conducted by him, the Board was cast in the role of accuser, the Examiner in that of judge; that the burden was on the Board to prove its charges by competent and credible evidence and not upon the respondent to disprove them; and that the Examiner was obligated by virtue of his office to hear all the witnesses, and to make his determination, fairly and impartially, without predilection for any, or pre-determination as to the result.

Turning to the testimony given by the witnesses of the General Counsel, it is at once evident that to the mind of the examiner, the burden was not on the Board to prove violations of the Act, but upon respondent to prove that it had committed no wrong. To his eager credulity "straws in the wind offered in support of the Board's case became hoops of steel, and trifles light as air were confirmations strong as proofs from Holy Writ." (*NLRB v. Ray Smith Transport Co.*, *supra.*)

It was in this attitude, so evident in the long and argumentative report of the examiner, couched in language not of adjudication but of advocacy which enabled the Trial Examiner to find against respondent on every issue and to disregard the complete testimony of respondent's witnesses and give credit to the testimony of the Board's witnesses even though the clear weight of the evidence was against such conclusions.

It was this attitude of the Examiner which enabled him to disregard and discredit the positive testimony of all of respondent's witnesses and the testimony favorable to respondent brought out by cross-examination of witnesses for the Board.

It was this attitude that enabled him to find that the discharge of Leonard was made for union activity in the face of the positive testimony of respondent and its officer that the discharge was for cause, that Leonard was replaced by a union man and that respondent knew nothing of Leonard's activities except the wearing of the button. It was this attitude that led to the complete disregard of the undisputed evidence that respondent had instructed repeatedly there was to be no discrimination and that the employees were free to choose the union if they so desired. It was this attitude that enabled him to disregard the fact that seven known union adherents were in nowise mistreated.

It was this attitude that enabled the Trial Examiner to find, without statutory proof, that Ogan was a super-

visor, so that he could find Ogan's extra-curricular activities were responsibilities of respondent. The Trial Examiner, as an advocate shrewdly conscious of this gap in the evidence hides behind an ancient and discarded principle of the Wagner Act which has been completely removed by amendment.

His ruling and findings are based upon suspicion and conjecture and display a willingness to believe the worst against respondent. He piled inference upon inference, unsupported by legal evidence in the record, as his report clearly shows.

The Examiner's approach to this case was obviously one of predetermination and when witnesses of the General Counsel did not testify the way he thought they should he took over the examination and led the witnesses into saying what he wanted them to say.

It is well settled law that where a witness' testimony is not contradicted, a trier has no right to refuse to accept them. (*Arnall Mills v. Smallwood*, 68 F. 2d at 59.) Evidence cannot be disregarded just because it comes from witnesses of respondent. (*Chesapeake & Ohio R. Co. v. Marting*, 283 U. S. 214; *Georgia R. & Banking Co. v. Wall*, 80 Ga. 202; *Penna. R. Co. v. Chamberlain*, 288 U. S. 333; *NLRB v. Russell*, 91 F. 2d 358.)

The statutory scheme of the Taft-Hartley Act is designed to afford to all a fair and impartial hearing, the lack of which vitiates any and all orders predicated thereon.

### Conclusion.

It is respectfully submitted that the Board's findings are not supported by substantial evidence on the record considered as a whole; that respondent has not received the requisites of due process in the hearing or order; that the Board erred in setting aside a valid renunciation of the union by respondent's employees; that respondent is not engaged in a business over which the Act governs and that the order of the Board is invalid and improper and should be set aside.

Respectfully submitted,

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February, 1952.







## APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151 *et seq.*), are as follows:

### DEFINITIONS.

SEC. 2. When used in this Act—

\* \* \* \* \*

(11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

\* \* \* \* \*

### RIGHTS OF EMPLOYEES.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

## UNFAIR LABOR PRACTICES.

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \* \*

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: \* \* \*

\* \* \* \* \*

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

\* \* \* \* \*

“(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

## REPRESENTATIVES AND ELECTIONS.

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment: \* \* \*

\* \* \* \* \*



“(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.”

#### PREVENTION OF UNFAIR LABOR PRACTICES.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. \* \* \*

(c) \* \* \* If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act \* \* \* No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged for cause. \* \* \*

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia) within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. \* \* \*

No. 13140

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

*v.*

**HOWELL CHEVROLET COMPANY, RESPONDENT**

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**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

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**REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**FILED**

**MAR 29 1952**

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CLERK**





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(I)



# **In the United States Court of Appeals for the Ninth Circuit**

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No. 13140

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

HOWELL CHEVROLET COMPANY, RESPONDENT

---

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD*

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## **REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

This reply brief is directed to two of the points discussed in respondent's brief, namely, Point V—the contention that the Board improperly set aside the election, and Point VI—the contention that the trial examiner was biased and failed to afford respondent a fair hearing.<sup>1</sup>

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<sup>1</sup> We here wish to make brief reference, however, to one aspect of another of respondent's contentions—that which concerns the supervisory status of Foreman Ogen (Bd. Main Br., 15–17, Resp. Br., 17–20). Respondent relies (Br. 18, n. 3) on that portion of the Senate Report (No. 105 on S. 1126) which cites *Endicott Johnson Co.*, 67 N. L. R. B. 1342, 1347, as a case where the Board held that certain “persons having title of foreman and assistant foreman but with no authority other than to keep production moving” were not supervisory employees. As it happens, the employees in the *Endicott* case had neither title of “foreman or assistant foreman,” but were referred to in the Board's decision as “so-called ‘supervisory employees.’” While the Board would

## I

Respondent contends in Point V of its brief (pp. 31-34) that because the Union did not withdraw its representation petition (filed at the same time the Union initially requested respondent to bargain) and participated in the election, it waived, as a basis for objection to the election, the unfair labor practices which occurred, with its knowledge, between the time of the filing of the petition and the holding of the election. Respondent's position appears to be that until the Board resolved the question of representation assertedly involved in the proceeding initiated by the Union under Section 9 (c) of the Act,<sup>2</sup> respondent could not properly recognize any union as the exclusive bargaining representative of its employees, and that the only "resolution" possible was that which accorded with the tally of the ballots cast in the elec-

be the first to assert that mere nomenclature is not conclusive, respondent seems to have missed the clear distinction between a self-serving declaration and an admission against interest. Of course, an employer may not foreclose the right of *others* by the use of a title which falsely describes a person's duties, but neither is he in a position to discount the inference flowing from his voluntary act of according a person a rank and title clearly connoting supervisory duties and responsibilities.

<sup>2</sup> Section 9 (c) of the Act, in pertinent part, reads as follows: "Whenever a petition shall have been filed \* \* \* alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative \* \* \*, the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. \* \* \* If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."



tion showing the Union to have polled less than a majority. This inference, so respondent argues, flows from the Union's action in pursuing the representation proceeding through to the election instead of filing unfair labor practice charges with the Board, thus "waiving" the unfair labor practices as a basis for objection to the election. But this contention overlooks the distinction between proceedings involving a *bona fide* representation question and those discovered as a result of later employer misconduct never to have involved a genuine question in the first instance.

The Board's policy with respect to the latter type of case, of which the instant case is an example, is discussed in its decision in *M. H. Davidson Company*, 94 N. L. R. B. No. 34.<sup>3</sup> There the Board pointed out that the "waiver" proposition under discussion has been applied by the Board only in those cases in which a *bona fide* question of representation, within the meaning of Section 9 (c) of the Act, was raised by the employer's rejection of the union's bargaining request because the employer had a good faith doubt as to the union's claimed majority status. When the union thereupon files a petition under Section 9 (c) the statutory machinery for determining the employees' choice of representatives begins to operate.<sup>4</sup> In

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<sup>3</sup> Since Volume 94 of the Board's decision is not yet in print we have reproduced in the Appendix hereto both the majority and minority opinions in the *Davidson* case.

<sup>4</sup> When a petition is filed under Section 9 (c) "alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative," the Board, through a Regional Director, makes a preliminary investigation to determine whether there is

such a case, where the employer commits unfair labor practices subsequent to the union's filing of the petition but the union "did [not] file any unfair labor practice charges \* \* \* [but] instead \* \* \* took its chances, preferring to await the result of the election," the Board has held that the union is bound by the election results and may not upset them by belatedly pointing to the employer's improper conduct of which it had knowledge prior to the election. *Denton Sleeping Garment Mills, Inc.*, 93 N. L. R. B. 329, 330, and cases there cited.

The Board finds this so-called "waiver" rule inapplicable, however, in cases where, as here and in *Davidson, supra*, the "question" which gave rise to the whole election proceeding turns out to be no question at all because the employer's challenge of the union's initial bargaining request was not based upon a good faith doubt as to the union's asserted majority status. As the Board held in the *Davidson* case:

\* \* \* to apply the waiver doctrine here, would require complete disregard of the Board's obligation to enforce the public policy

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"reasonable cause to believe that a question of representation affecting commerce exists" (Section 9 (c) of the Act). If the investigation discloses such "reasonable cause" the Board conducts a hearing to make a definite determination whether "such a question of representation exists." If the Board finds that no question exists it dismisses the petition. If it finds that a question does exist, it orders an election to resolve it, and certifies the election results. It is plain that under the very terms of the statute the mere filing of a petition does not automatically raise a "question concerning representation." *Ensher, Alexander & Barsoom*, 74 N. L. R. B. 1443, 1444-1445. Cf. *N. L. R. B. v. Flotill Products, Inc.*, 180 F. 2d 441 (C. A. 9); *N. L. R. B. v. The Standard Steel Spring Co.*, 180 F. 2d 942, 945-946 (C. A. 6).

against those refusals to bargain which are successful in inducing a union to file a petition—and in inducing the Board, in the representation proceeding, to find a question of representation—in the mistaken belief that a question of representation had in fact arisen. Here, the unfair labor practice which initiated the election did not occur after a genuine question of representation had arisen, but was the very refusal to bargain which induced both the Union and the Board to conclude, albeit erroneously, that such a question had arisen, and which induced the filing of the petition. In such a situation the Board's statutory obligation to prevent refusals to bargain and to enforce the public policy enunciated by the Act<sup>6</sup> is paramount. The Board cannot permit a possible waiver by a private party to overrule this policy.[<sup>5</sup>]

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<sup>6</sup> See *Radio Corporation of America*, 74 N. L. R. B. 1729, where the employer argued that the election should not be invalidated despite its own extensive unfair labor practices, because the Union knew of these practices before the election but nevertheless chose to proceed with the election. In rejecting this argument, the Board pointed out that the employer was trying to immunize "*its own wrongful conduct*" (emphasis in original). Mr. Reynolds' dissent appears to have hinged upon what he considered the Union's "abuses of the Board's process," a conclusion not supported by the record in *this* case.

Similarly, the Board has declined to give effect to other restrictions upon collective bargaining when outweighed by the policy of protecting the statutory rights of employees. See *Bethlehem Steel Co.*, 89 N. L. R. B. 132, and cases cited therein; *J. J. Newberry Co.*, 88 N. L. R. B. 947.

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<sup>5</sup> Although the Union in the present case filed its petition on the same day that it mailed its bargaining request to respondent



In the instant case the Board certainly cannot be said to have acted arbitrarily in following the policy it did, and in refusing to permit respondent to use the representation proceeding as a protection for its unlawful refusal to bargain and its subsequent outright campaign to destroy the Union's majority (Bd. Main Br., 20-22). Clearly applicable is *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732 (C. A. D. C.), certiorari denied, 341 U. S. 914, upon which the Board relied (R. 62, n. 14). There the Court said (185 F. 2d, at p. 741):

When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in Section 8 (a) (5) of the Act. [Citing cases.] The Act provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate agent with which to bargain. Another purpose is to insure that the employees may freely register their individual choices concerning representation. Certainly it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union.

---

(R. 21), the applicable principle is the same. It remains that respondent's bad faith refusal to bargain gave rise to the false "question" which was the basis for the representation proceeding.



See also the discussion in our main brief at pages 20-22.

Respondent's contrary contention, that the Board should not have set the election aside here, but should have found on the basis of the election that the Union had no majority, and that therefore respondent was under no obligation to bargain with it, is borrowed almost entirely from Member Murdock's dissent in the *Davidson* case, *supra*. Respondent's argument, however, overlooks the plain fact that the disagreement between the majority and the dissent concerned only the choice between alternative policies, each being plainly within the framework of a reasonable exercise of the Board's discretion.<sup>6</sup>

## II

Respondent's claim that the trial examiner did not accord it a fair hearing is without substance. Examination of the record at the places which respondent cites at pages 34 and 35 of its brief, far from showing any impropriety on the part of the trial examiner, demonstrates that he was conscientious in carrying out his function as presiding officer and properly alert to protect the record against uncertainty and

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<sup>6</sup> *N. L. R. B. v. John Deere Plow Co.*, 187 F. 2d 26 (C. A. 5) (Resp. Br. 32), is not in point. What was involved there was not a finding of a bad faith refusal to bargain at the *outset*, but at a later stage in the representation proceedings when the union, after losing the election, again demanded bargaining in the face of the fact that the Board had not yet passed on its objections to the election. The dissenting view there was that, under the circumstances, it was not bad faith for the employer to reject the bargaining request at that stage. See 82 NLRB 69, 70-72, 75.

ambiguity. "It is the function of an examiner, just as it is the recognized function of a trial judge, to see that the facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made." *Bethlehem Steel Co. v. N. L. R. B.*, 120 F. 2d 641, 652 (C. A. D. C.); *N. L. R. B. v. Baldwin Locomotive Works*, 128 F. 2d 39, 46 (C. A. 3); *N. L. R. B. v. Franks Bros. Co.*, 137 F. 2d 989, 991 (C. A. 1), *affd.*, 321 U. S. 702.

Moreover, even assuming *arguendo* that, as respondent claims (Br., 34, 36-37), the trial examiner "quite uniformly credit[ed] testimony favorable to the charges and as uniformly discredit[ed] testimony opposed," the trial examiner is not thereby shown to have been biased and prejudiced against respondent. In *N. L. R. B. v. Pittsburgh Steamship Co.*, 337 U. S. 656, the Supreme Court reversed the holding of the lower court which had found that such a circumstance in itself showed bias. The Supreme Court said (p. 659):

We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact \* \* \* Accordingly, total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.

Accord: *United States v. Yellow Cab Co.*, 338 U. S. 338, 341; *N. L. R. B. v. Robbins Tire & Rubber Co.*,

161 F. 2d 798, 800 (C. A. 5). See also *N. L. R. B. v. Auburn Foundry*, 119 F. 2d 331, 333, C. A. 7).

#### CONCLUSION

It is respectfully submitted that the record amply reveals that the Board's findings are supported by substantial evidence, that respondent received a full and fair hearing and that the Board's order should be enforced in full, as prayed in the Board's petition for enforcement.

GEORGE J. BOTT,  
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 DAVID P. FINDLING,  
*Associate General Counsel,*  
 A. NORMAN SOMERS,  
*Assistant General Counsel,*  
 MARCEL MALLET-PREVOST,  
 WILLIAM J. AVRUTIS,  
*Attorneys,*  
*National Labor Relations Board.*

MARCH 1952.

## APPENDIX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 1-CA-483, 1-RC-969

IN THE MATTER OF THE M. H. DAVIDSON COMPANY *and*  
INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS'  
UNION OF NORTH AMERICA, AFL

### DECISION AND ORDER

On July 21, 1950, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it be ordered to cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended dismissal of the allegations of the complaint relating thereto.<sup>1</sup> It was further recommended that the Board sustain the objections to the election which was held on July 22, 1949, set aside the election, and dismiss the petition in Case No. 1-RC-969. Thereafter, the Respondent filed exceptions to the Intermediate Report, and a supporting brief.

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<sup>1</sup> As no exception has been filed to this recommendation, we shall dismiss the allegations in the complaint relating to these unfair labor practices.



The Board<sup>2</sup> has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the brief and exceptions, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner,<sup>3</sup> with the following amplification.

The Trial Examiner found, and we agree, that on and after April 11, 1949, the Respondent refused to bargain collectively with the Union in violation of Section 8 (a) (1) and (5) of the Act, and that the subsequent election of July 22 did not represent the free and uncoerced choice of the Respondent's employees and should be set aside. Shortly before April 11, the Union, having been designated by a majority of the employees in the appropriate unit described in the Intermediate Report, wrote to the Respondent, requesting a collective bargaining conference. Upon receiving this letter on April 11, the Respondent replied, in bad faith as its later conduct disclosed, that it doubted the Union's majority claim and declined to bargain collectively as requested.

At the same time, the Respondent promptly embarked on an extensive campaign of further unfair labor practices directed against its employees' right to bargain through the Union, as set forth in detail in the Intermediate Report. This campaign included

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<sup>2</sup> Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

<sup>3</sup> The Intermediate Report contains an inadvertent inaccuracy in that it states that "\* \* \* the Respondent, as a matter of standard procedure, did not, at least until July 12, 1945, delete the union affiliation question from its job application forms." The date should be July 12, 1949. The Intermediate Report is hereby corrected accordingly.

questioning employees concerning their union membership and activity and their intended vote at the coming Board election, repeatedly threatening reprisals for supporting the Union, promising benefits for rejecting the Union, and finally discharging two employees because of the Union. The election resulted in five votes for and six against the Union, with two ballots challenged. On November 14, the Regional Director issued a Report, stating that his investigation of objections to the election had disclosed apparent unlawful interference by the Respondent, and recommending that the Board hold a hearing thereon.<sup>4</sup>

*No exceptions were filed by Respondent to the Regional Director's report.*—Accordingly, the Board on November 25, 1949, adopted the report and directed that a hearing be held on the objections. Thereafter, the General Counsel issued a complaint against the Respondent alleging a preelection violation of Section 8 (a) (5), and violations of other provisions of the Act. The General Counsel also issued a notice of consolidated hearing on the complaint and the objections. After a full hearing in which the Respondent participated, the Trial Examiner on July 21, 1950, issued his Intermediate Report, as stated above, sustaining the 8 (a) (5) and many of the other allegations, and recommending that the election be set aside.

Absent the representation proceeding, uniform Board policy, as detailed in the Intermediate Report, would be to reject the Respondent's expressed doubt of the Union's majority, because of the bad faith with which it was asserted, and to find a violation of the Act. Nor does the dissenting opinion dispute this

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<sup>4</sup>The Regional Director further recommended that the challenges await disposition of the objections.

wise policy. It appears to argue, however, that the Union waived its right to complain of the Respondent's unlawful conduct by proceeding to an election with knowledge of that conduct, that the election was valid because the Board would not thereafter permit the Union to withdraw its waiver; and that the Respondent's earlier unlawful refusal to bargain is therefore beyond the Board's reach. We think this a misapplication of the Board's "waiver" principle. Those cases in which the Board has applied that principle<sup>5</sup> have assumed the existence of a *bona fide* question of representation; no questions of the employer's prior good faith in challenging the union's majority have been raised or litigated. Here, the basic issue is whether there was any genuine question of representation at any time. The Respondent's actions here demonstrate the bad faith of its original challenge of the Union's majority. We hold that, the Respondent's challenge of the Union's majority on April 11 having been in bad faith, no genuine question of representation was raised. We therefore regard the election as a nullity.

Furthermore, to apply the waiver doctrine here, would require complete disregard of the Board's obligation to enforce the public policy against those refusals to bargain which are successful in inducing a union to file a petition—and in inducing the Board, in the representation proceeding, to find a question of representation—in the mistaken belief that a question of representation had in fact arisen. Here, the unfair labor practice which vitiated the election did not occur after a genuine question of representation had arisen, but was the very refusal to bargain which induced both the Union and the Board to conclude,

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<sup>5</sup> *Denton Sleeping Garment Mills, Inc.*, 93 N. L. R. B. No. 47, and cases cited therein.



albeit erroneously, that such a question had arisen, and which induced the filing of the petition. In such a situation the Board's statutory obligation to prevent refusals to bargain and to enforce the public policy enunciated by the Act<sup>6</sup> is paramount. The Board cannot permit a possible waiver by a private party to overrule this policy.

Although the dissent alludes to the *John Deere* case,<sup>7</sup> we find it clearly distinguishable. Here no question concerning representation was pending at the time when the Respondent unlawfully refused to bargain collectively with the Union. On the contrary, it was only *thereafter* that the Respondent prevailed upon the Union to file its representation petition. We believe that in these circumstances the governing precedent is *Joy Silk Mills, Inc.*, 85 N. L. R. B. 1263, where Members Reynolds and Murdock joined in the 8 (a) (5) finding which the Court of Appeals for the District of Columbia subsequently enforced.<sup>8</sup>

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<sup>6</sup> See *Radio Corporation of America*, 74 N. L. R. B. 1729, where the employer argued that the election should not be invalidated despite its own extensive unfair labor practices, because the Union knew of these practices before the election but nevertheless chose to proceed with the election. In rejecting this argument, the Board pointed out that the employer was trying to immunize "*its own wrongful conduct*" (emphasis in original). Mr. Reynolds' dissent appears to have hinged upon what he considered the Union's "abuses of the Board's process," a conclusion not supported by the record in *this* case.

Similarly, the Board has declined to give effect to other restrictions upon collective bargaining when outweighed by the policy of protecting the statutory rights of employees. See *Bethlehem Steel Co.*, 89 N. L. R. B. 132, and cases cited therein; *J. J. Newberry Co.*, 88 N. L. R. B. 947.

<sup>7</sup> *N. L. R. B. v. John Deere Plow Company*, 27 L. R. R. M. 2348 (C. A. 5, February 13, 1951), vacating 82 N. L. R. B. 69 with respect to the 8 (a) (5) finding.

<sup>8</sup> 185 F. 2d 732.



[Provisions of Board's Order omitted.]

Signed at Washington, D. C., May 2, 1951.

[SEAL]

PAUL M. HERZOG,

*Chairman,*

PAUL L. STYLES,

*Member,*

*National Labor Relations Board.*

ABE MURDOCK, *Member*, dissenting in part:

I disagree with the conclusion of the majority that the Respondent violated Section 8 (a) (5) of the Act in refusing to bargain with the Union as the exclusive representative of its employees on and after April 11, 1949.

On April 9, 1949, the Union wrote the Respondent, claiming to represent a majority of the employees in the appropriate unit and requesting a bargaining conference. Two days later the Respondent's president orally advised the Union that he did not believe the Union had a majority and would have nothing to do with it. On the same day the Union filed the petition in Case No. 1-RC-969. On June 29, 1949, after an investigation and formal hearing, the Board issued its decision in that case in which it found that a question of representation existed and directed an election to resolve that question. Thereafter on July 22, 1949, an election was held in which five votes were cast for the Union, six against, and two votes were challenged. On July 28, 1949, the Union filed the charges in this proceeding and on the next day filed objections to the election based on the facts alleged in these charges. Meanwhile, at various times from March 1949 through at least July 12, 1949, the Respondent engaged in illegal acts of interference and discrimination.

Thus it appears that, after a full and formal hearing in a representation proceeding, the Board found

a question of representation existed concerning the employees here involved and directed an election. The effect of a finding of unlawful refusal to bargain in this proceeding is to penalize the Respondent for having previously arrived at the same conclusion. In the light of the existence of a representation question, as found by the Board, I am unable to accept, as do my colleagues, the Trial Examiner's implicitly contrary conclusion of law that "On April 11, 1949, International Printing Pressmen and Assistants' Union of North America, AFL, was, and at all times since has been, the exclusive representative of all employees in the appropriate unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act." The Union itself when it filed its representation petition indicated its conviction that a question of representation existed which ought to be resolved by an election. As evidenced by its support of the petition through the Board's processes of investigation, hearing, election and objections to the election, the Union apparently still retains that conviction.

My view in this matter is supported by the recent decision in *N. L. R. B. v. John Deere Plow Company*, 27 L. R. R. M. 2348 (C. A. 5, February 13, 1951). The court there, expressly adopting the dissenting opinion of Member Reynolds and myself, refused to enforce a Board order to bargain rendered in circumstances similar in essential elements to those appearing here. In that case, Member Reynolds and I stated: "We have been under the impression that if any legal proposition could be said to represent well-established Board doctrine, it is the proposition that so long as there exists an unresolved question concerning representation there can be no exclusive bargaining representative, and hence no legal obligation to bargain." That principle is applicable here with even

stronger force. In the *John Deere* case the parties had agreed to a consent election. Here, the Board itself after formal hearing found the existence of a question of representation.

Besides the basic legal inconsistency in the result reached by the majority there are other considerations which impel me to disagree with that result. After the Respondent's refusal to bargain, the Union had one of two courses of action open to it to establish officially its status as bargaining agent: it could have filed 8 (a) (5) charges or instituted a representation petition. It chose the latter course. I do not mean to imply that the Union should be considered to have bound itself irrevocably to follow the procedure it first initiated. Had it sought a withdrawal of its petition at an appropriate time, the Board would in all likelihood have granted the request. But the Union did not do this. Instead it supported its petition through a hearing and an election. During this period, up to about 2 weeks before the election, the Respondent was engaging in the acts complained of by the Union in the complaint proceeding. The Union certainly knew of the Respondent's refusal to bargain and also must have known of the overt acts of interference and discrimination. Yet at no time before the election did the Union protest the activity of the Respondent nor file charges based on that activity. Rather, it chose to await passively the results of the election. In similar circumstances the Board has held that the Union could not thereafter raise as objections to the election the acts of the Employer of which it had knowledge.<sup>10</sup> That principle is controlling here with the result that the election in Case No. 1-RC-969 must be considered to be a valid and effective elec-

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<sup>10</sup> *Denton Sleeping Garment Mills, Inc.*, 93 N. L. R. B. No. 47, and cases cited therein in footnote 3.



tion. Having chosen to participate in such election as a means to establish its bargaining status, the Union should not thereafter be allowed to recant and seek to pursue a remedy it previously chose to ignore. Nor should the Board disavow a valid election conducted under its auspices and proceed to order the Respondent to bargain with the Union regardless of the outcome of that election.

The Board has long recognized that good administrative practice decrees that it should not be profligate in the exercise of its functions and therefore it has adopted various safeguards to conserve its energies. Examples of these are the requirement of substantial showing of interest to support a petition and the refusal of the Board to proceed in cases where jurisdiction is present, but to assert it would not effectuate the policies of the Act. The requirement of a waiver before proceeding in a representation matter when a related charge has been filed is also a device of this sort. Similar to this is the firm practice of the Board to suspend the processing of a representation case when a related charge of refusal to bargain is filed. Waivers are not accepted in such cases as they are in situations where other unfair labor practices are concerned.<sup>11</sup> This practice is a recognition of the fact that inasmuch as a representation matter and a refusal to bargain proceeding are directed at the same end, it would not be consonant with good administration to allow both to be prosecuted at the same time. By waiting until after the election before filing its charges, the Union avoided this sound policy and caused the Board to engage in fruitless and expensive procedures. It is unimportant whether or not the

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<sup>11</sup> Inasmuch as the majority does not deal with this question, it is not clear whether the Board is abandoning this practice or thinks that this case is distinguishable on the facts.



Union deliberately timed its filing of charges to avoid having action suspended on its representation petition. What is important is that the effectuation of an established Board policy should not be determined by the desire of a charging party as to when it will file its charge. The decision of the majority gives formal sanction to such a practice and can lead only to a diffusion and waste of Board processes.

For the foregoing reasons, I would dismiss that portion of the complaint which alleges an illegal refusal to bargain. In Case No. 1-RC-969, I would not dismiss the petition, but would process the challenged ballots in the usual manner.

Signed at Washington, D. C., May 2, 1951.

ABE MURDOCK,

*Member.*



No. 13141

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United States  
Court of Appeals  
For the Ninth Circuit.

---

FIBREBOARD PRODUCTS, INC., a Corporation,  
Appellant,

vs.

W. H. TOWNSEND,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Southern Division

FILED

JAN - 1 1952

PAUL P. O'BRIEN

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK





No. 13141

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of California,  
in and for the City and County of San Francisco

No. 393360

W. H. TOWNSEND,

Plaintiff,

vs.

FIBREBOARD PRODUCTS, INC., FIRST DOE,  
SECOND DOE and DOE CORPORATION,

Defendants.

### COMPLAINT

Comes now the plaintiff above named and complains of the above-named defendant and for cause of action alleges:

#### I.

That the true names of the defendants, First Doe, Second Doe and Doe Corporation are unknown to Plaintiff, and said defendants are therefore sued herein by said names which are fictitious and plaintiff hereby prays leave to charge said defendants herein by their true names when the same shall be ascertained, and to charge said defendants by suitable allegations herein and amendments hereto.

#### II.

That the defendant, Fibreboard Products, Inc., is a corporation organized and existing under and by virtue of the laws of the state of Delaware and is duly licensed and authorized to do business in the State of California, and is engaged in said

business in said state and has its principal place of business in the City and County of San Francisco in said State of California.

### III.

That on or about the 18th day of October, 1948, at the City of Antioch, in the County of Contra Costa, State of California, the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as a Recovery Operator in the Recovery Department of the San Joaquin Division of said Fibreboard Products, Inc., situated at Antioch, in said last named County and State, and that the defendants should employ this plaintiff as such Recovery Operator for an indefinite time, commencing upon the completion of the erection and construction of said Recovery Department of said San Joaquin Division of said Fibreboard Products, Inc., and that defendants would pay plaintiff for such services at the rate of \$1.725 per hour from and after the commencement of the term of said employment.

### IV.

That the Recovery Department of said San Joaquin Division of said Fibreboard Products, Inc., was completed and ready for operation on or about the 15th day of October, 1949; that on the 2nd day of November, 1949, at Antioch, County of Contra Costa, State of California, the plaintiff offered to enter upon the services of defendants and has ever since been ready and willing to do so.

## V.

That in pursuance of said agreement of employment and in pursuance of the promise and agreements of defendants to pay to plaintiff the cost of his transportation from the City of Tuscaloosa, Alabama, where he resided on said 18th day of October, 1948, to the City of Antioch, County of Contra Costa, State of California, plaintiff did remove from the said City of Tuscaloosa, to the said City of Antioch, at his cost and expense in the sum of \$500; and that, in pursuance of said agreement of employment and the said removal of plaintiff and his said family from the said City of Tuscaloosa to the said City of Antioch, for the purpose of rendering himself available for the performance of said contract on his part, plaintiff was obliged to and did sell and dispose of his household furnishings and effects in the City of Tuscaloosa and to purchase and acquire other household furniture and effects in the City of Antioch, to his cost, damage and expense in the sum of \$2,000; and further, by reason of the necessity for the removal of plaintiff from the said City of Tuscaloosa to the said City of Antioch for the purpose of complying with the said agreement of employment, plaintiff was obliged to, and did, vacate the housing accommodations occupied by him in the City of Tuscaloosa, at the monthly rental of \$32.50 and to acquire and occupy a resident housing accommodation in the said City of Antioch, at the monthly rental of \$80 to the cost, damage and expense to plaintiff in the sum of \$665 to the date of the com-



mencement of this action, and at the continuing loss, damage and expense to plaintiff at the rate of \$47.50 per month from and after the commencement of this action for a period of time, the duration of which plaintiff cannot now definitely state, except it will be for a considerable period.

## VI.

That the defendants refused to permit the plaintiff to enter upon such service as such Recovery Operator or to pay him for his services to the damage of the plaintiff in the sum of One Hundred Thousand (\$100,000.00) Dollars.

Wherefore, plaintiff prays judgment against the plaintiff in the sum of One Hundred Three Thousand Six Hundred Fifteen (\$103,615.00) Dollars; damages accrued to the date of the commencement of this action; damages at the rate of Forty-seven and 57/100 (\$47.57) Dollars for such period of time as the Court shall adjudged it to have been reasonable for plaintiff to have occupied the housing accommodations in this complaint referred to; for his costs of suit herein incurred; and for such other and further relief as shall to the Court be meet and proper in the premises.

C. K. CURTRIGHT,  
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed January 26, 1950.



In the United States District Court for the Northern  
District of California, Southern Division

No. 29449

W. H. TOWNSEND,

Plaintiff,

vs.

FIBREBOARD PRODUCTS, INC., FIRST DOE,  
SECOND DOE, and DOE CORPORATION,

Defendants.

### FIRST AMENDED COMPLAINT

Comes now the plaintiff above named and files,  
as of course, this, his first amended complaint, com-  
plains of defendants above named, and for cause of  
action alleges:

#### I.

That the true names of the defendants, First Doe,  
Second Doe, and Doe Corporation, are unknown  
to plaintiff, and said defendants are therefore sued  
herein by said names, which are fictitious, and plain-  
tiff hereby prays leave to charge said defendants  
herein by their true names when the same shall be  
ascertained, and to charge said defendants by suit-  
able allegations herein and amendments hereto.

#### II.

That the defendant, Fibreboard Products, Inc.,  
is a corporation organized and existing under and  
by virtue of the laws of the State of Delaware  
and is duly licensed and authorized to do business

in the State of California, and is engaged in said business in said State and has its principal place of business in the City and County of San Francisco, in said State of California.

### III.

That on or about the 18th day of October, 1948, at the City of Antioch, County of Contra Costa, State of California, the plaintiff and defendants mutually agreed, orally and in writing, that the plaintiff should serve the defendants as a recovery operator in the Recovery Department in the San Joaquin Division of said Fibreboard Products, Inc., situated at Antioch in the said last-named County and State, and that the defendants should employ the plaintiff as such recovery operator for so long as plaintiff should desire to be so employed and for so long as plaintiff's work should be satisfactory, said employment to commence upon the completion of the erection and construction of said Recovery Department of said San Joaquin Division of said Fibreboard Products, Inc., and the defendants would pay plaintiff for such services at the starting rate of \$1.725 per hour from and after the commencement of the term of said employment and that said employment would be continuous and permanent, with chances and opportunity afforded to plaintiff for increase in the rate of his hourly compensation, and opportunity would be afforded to plaintiff for advancement to other and higher grades of employment with said defendant corporation; that at said time and place, and as part of

the contract hereinbefore set forth, it was further mutually agreed by and between plaintiff and defendants, orally and in writing, that it would be necessary for plaintiff to remove from the City of Tuscaloosa in the State of Alabama, where he then resided, to the City of Antioch, in the County of Contra Costa, State of California, and that in consideration of the acceptance of said employment by the plaintiff and the removal of plaintiff from said City of Tuscaloosa to said City of Antioch, defendants would pay to plaintiff upon the commencement of the term of said employment, at the City of Antioch, County of Contra Costa, State of California, the reasonable cost and expense of plaintiff in the transportation of himself and his family from said City of Tuscaloosa to said City of Antioch, as aforesaid.

#### IV.

That the Recovery Department of said San Joaquin Division of said Fibreboard Products, Inc., was completed and ready for operation on or about the 15th day of October, 1949; that on the 2nd day of November, 1949, at Antioch, County of Contra Costa, State of California, the plaintiff offered to enter upon the service of defendants, and has ever since been ready, willing, and able to do so.

#### V.

That in pursuance of said agreement of employment and in pursuance of the promise and agreement of defendants to pay to plaintiff the cost of



transportation for him and his family from the City of Tuscaloosa, Alabama, where he resided on said 18th day of October, 1948, to the City of Antioch, County of Contra Costa, State of California, plaintiff, on or about the 15th day of November, 1948, did remove from the said City of Tuscaloosa, to said City of Antioch, at his cost and expense in the sum of \$500; and that, in pursuance of said agreement of employment and the said removal of plaintiff and his said family from the said City of Tuscaloosa to the said City of Antioch, for the purpose of rendering himself available for the performance of said contract on his part, plaintiff was obliged to and did sell and dispose of his household furnishings and effects in the City of Tuscaloosa, and to purchase and acquire other household furniture and effects in the City of Antioch, to his cost, damage and expense in the sum of \$2,000; and further, by reason of the necessity for the removal of plaintiff from the said City of Tuscaloosa to the said City of Antioch for the purpose of complying with the said agreement of employment, plaintiff was obliged to, and did, vacate the housing accommodations occupied by him in the City of Tuscaloosa, at the monthly rental of \$32.50 and to acquire and occupy a resident housing accommodation in the said City of Antioch, at the monthly rental of \$80 to the cost, damage and expense to plaintiff in the sum of \$665 to the date of the commencement of this action, and at the continuing loss, damage and expense to plaintiff at the rate of \$47.50 per month from and after the commence-



ment of this action for a period of time, the duration of which plaintiff cannot now definitely state, except it will be for a considerable period.

## VI.

That the position of recovery operator is a highly skilled and specialized job requiring for its efficient performance years of experience and an extensive and thorough training; that said position is the highest grade of employee in the operation of a kraft paper mill; that plaintiff is fully and duly qualified by training, education, and experience to perform efficiently all and every one of the duties of a recovery operator, and that plaintiff is, and at all times herein mentioned has been, ready, able, and willing to do and perform all of the duties of said position.

## VII.

That the defendants refused to permit the plaintiff to enter upon such service as such recovery operator or to pay him for his services, to the damage of the plaintiff in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, plaintiff prays judgment against the defendants in the sum of One Hundred Three Thousand Six Hundred Fifty Dollars (\$103,615.00); damages accrued to the date of the commencement of this action; damages at the rate of Forty-seven and 50/100 Dollars (\$47.50) for such period of time as the Court shall adjudge it to have been reasonable for plaintiff to have occupied the hous-

ing accommodations in this complaint referred to; for his costs of suit herein incurred; and for such other and further relief as shall to the Court be meet and proper in the premises.

C. K. CURTRIGHT,

CHARLES R. GARRY,

/s/ C. K. CURTRIGHT,

Attorneys for Plaintiff.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 7, 1950.

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[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY DEFENDANT FIBREBOARD PRODUCTS, INC., TO PLAINTIFF

Pursuant to Rule 33, Federal Rules of Civil Procedure, defendant Fibreboard Products, Inc., hereby propounds the following interrogatories to be answered by plaintiff separately and fully in writing under oath:

\* \* \*

2. State the name and address of the owner of that certain 1942 Pontiac automobile which plaintiff drove from Birmingham, Alabama, to Antioch, California, in November, 1948.

3. State the name and address of the individual

or individuals who granted plaintiff permission or authority to drive the said automobile from Tuscaloosa, Alabama, to Antioch, California.

4. Attach a copy of the letter or document or written statement purporting to authorize plaintiff to drive the said automobile from Tuscaloosa, Alabama, to Antioch, California. . . .

5. State the terms of the agreement or arrangement other than the letter, document or written statement referred to in Interrogatory 4 pursuant to which plaintiff obtained the said automobile and drove it from Tuscaloosa, Alabama, to Antioch, California, and the date upon which such agreement or arrangements were made.

6. State the name and address of the business establishment from whose custody the plaintiff obtained the Pontiac sedan hereinabove referred to and the date upon which plaintiff obtained the said automobile.

\* \* \*

27. State the exact dates of the period during which plaintiff was employed by Otis Elevator Company in the State of Alabama in the year 1948.

28. State the name and address of the person who hired plaintiff and of each supervisor under whom plaintiff worked during the employment referred to in Interrogatory 27.

29. State the original terms of plaintiff's employment agreement with Otis Elevator Company referred to in Interrogatory 27, including:

- (a) Duration;
- (b) Wage rate;
- (c) Classification;
- (d) Type of work;
- (e) Any other term or conditions.

30. State any changes in the employment agreement referred to in Interrogatory 29 made in the course of the employment.

\* \* \*

34. State the dates of the periods during which plaintiff has been employed by each of the persons or business organizations given in answer to Interrogatory 33.

35. State the gross amounts received by or owing to plaintiff or for which credit has been given plaintiff in each employment referred to in Interrogatories 33 and 34.

Dated March 31, 1950.

BROBECK, PHLEGER &  
HARRISON,

Attorneys for Defendant  
Fibreboard Products, Inc.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 31, 1950.



[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES BY W. H.  
TOWNSEND, PLAINTIFF, PROPOUNDED  
BY DEFENDANT, FIBREBOARD PROD-  
UCTS, INC.

United States of America,  
State of California,  
City and County of San Francisco—ss.

W. H. Townsend, being first duly sworn, deposes  
and says:

That he is the plaintiff in the above-entitled ac-  
tion and that he answers the interrogatories pro-  
pounded to him by defendant Fibreboard Products,  
Inc., pursuant to Rule 33, Federal Rules of Civil  
Procedure, as follows:

\* \* \*

2. 1942 Pontiac club coupe, Motor No. P 8 KA,  
Lic. No. 512815, Maryland. Owned by Lt. B. E.  
McCharen, Jr., U. S. Army, Yokohama, Japan.

3. Mrs. Montez S. McCharen, whose address at  
that time was 304 Westover Drive, Birmingham,  
Alabama.

4. Attached hereto as Exhibit A.

5. It was a verbal agreement that I was to pay  
for gas and oil and grease jobs on car; any major  
repairs by Mrs. McCharen. The first I knew of  
this Pontiac car or of Mrs. Montez S. McCharen  
was when I read an ad in the classified section of  
the Sunday edition of the Birmingham News and

Age Herald on November 6, 1948. Telephoned 304 Westover Drive and spoke with Mrs. McCharen's mother, who told me that her daughter was asleep. I told her I would have my brother drive me to Birmingham in his car for a meeting regarding the driving of this car to Fort Mason, San Francisco. Met Mrs. Montez S. McCharen at 1:00 p.m. on Sunday, November 6, 1948, and an agreement was made. Returned to Birmingham on Monday, November 7, but car was in the shop and was told by Mrs. McCharen to return on Tuesday, November 8. On that date, she gave me written authority to get the car.

6. Shaver Pontiac Company Garage in Birmingham, Alabama, on Tuesday, November 9, 1948. Drove car to Tuscaloosa, Alabama, and left for Antioch on Wednesday, November 10, 1948.

\* \* \*

27. Do not remember the date I was employed by Otis Elevator Company but I last worked up to November 7, 1948, and left the job at noon that day.

28. Mr. Ussery. I presume his address is c/o Otis Elevator Company, Atlanta, Georgia, but am not sure.

29. First hired at \$1.43 per hour and on September 12, 1948, increased to \$1.58 per hour. I was classified as an elevator erector's helper. Our job was to install Otis elevators. No limitation as to period of duration.

30. Only change was the 15c per hour increase in pay. My duties were the same.

\* \* \*

34. Employed by the Southern Pacific Railroad Company from September 13, 1949, until February 7, 1950.

35. Total wages from Southern Pacific was approximately \$1,100, and, as I say, I may have made in the past seven months \$35 with Mr. Higgins.

/s/ W. H. TOWNSEND.

Subscribed and sworn to before me this 2nd day of June, 1950.

/s/ RAYMOND H. CRONIN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

## EXHIBIT A

(Copy)

### “To Whom It May Concern

“I, Montez S. McCharen, wife of B. E. McCharen, Jr., 1st Lt., ASN 0-1327557, do hereby grant authority to Willie Hugh Townsend to transport one Pontiac Automobile, Club Coupe, Model 1942, motor number P8KA 3693 license number 512815 Maryland from Birmingham, Alabama, to San Francisco, California, at which place the automobile will be turned in to the Transportation Officer, Fort Mason, California, for the purpose of

being transshipped to B. E. McCharen, Jr., 1st Lt., U. S. Army, Yokohama, Japan.

“/s/ MONTEZ S. McCHAREN

“304 Westover Drive

“B’ham 9, Alabama

“(Priority 370 November.)”

Subscribed and sworn to before me this 8th day of November, 1948, Notary public, Jefferson County, Alabama.

[Seal]      /s/ JACK VERNON DAVIDSON,  
Notary Public.

My Commission Expires Oct. 20, 1952.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 6, 1950.

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[Title of District Court and Cause.]

### FIRST AMENDED ANSWER

Comes now defendant Fibreboard Products, Inc., one of the defendants in the above-entitled action, and in answer to the complaint on file herein admits, denies and alleges as follows:

#### I.

Answering paragraph III of the First Amended Complaint, defendant denies generally and specifically each and every, all and singular, the allegations contained therein. Defendant alleges that on



or about August 31, 1949, it offered employment to the plaintiff at its plant known as the San Joaquin Division, at Antioch, County of Contra Costa, State of California, and that plaintiff refused said offer of employment. Defendant further alleges that it employed plaintiff on a temporary basis from on or about November 24, 1948, until on or about September 3, 1949.

## II.

Answering paragraph IV of the complaint, defendant alleges that the so-called recovery department of its plant known as the San Joaquin Division at Antioch, County of Contra Costa, State of California, was completed and ready for operation on or about October 15, 1949; defendant denies generally and specifically each and every, all and singular, the allegations of said paragraph IV not herein specifically admitted.

## III.

Answering paragraphs V and VI of the complaint, defendant denies generally and specifically each and every, all and singular, the allegations contained in said paragraphs.

## IV.

Answering paragraph VII of the complaint, defendant denies generally and specifically each and every, all and singular, the allegations contained therein and further denies that plaintiff has been damaged in the sum of One Hundred Thousand Dollars (\$100,000.00) or in any sum or at all, and

defendant alleges that it has paid plaintiff in full for any and all services rendered to defendant or requested to be rendered to defendant.

As and for a further answer to the First Amended Complaint on file herein, and by way of affirmative defense, defendant Fibreboard Products, Inc., alleges as follows:

1. The oral agreement or agreements alleged and referred to in paragraphs III, IV, V, VI and VII of the complaint are invalid and unenforceable, in that said contracts, either collectively or individually, are not in writing and subscribed by the party to be charged or by his agent.

Wherefore, defendant prays that it be hence dismissed with its costs of suit herein incurred, and for such other relief as to the Court may seem meet and proper in the premises.

Dated September 22, 1950.

BROBECK, PHLEGER &  
HARRISON,

Attorneys for Defendant,  
Fibreboard Products, Inc.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 25, 1950.

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between counsel for plaintiff and counsel for Fibreboard Products, Inc., one of the defendants, that the testimony of Mr. E. R. Utley, a witness called by said defendant in the above-entitled matter, whose business address is c/o Otis Elevator Company, Durham, North Carolina, may be taken pursuant to this Stipulation, and by means of the written interrogatories attached hereto, that Mr. Utley may answer the said interrogatories in writing and subscribe to same before a notary public or other officer commissioned to administer oaths, and that the interrogatories and the written answers thereto may be used in the trial of the above-entitled matter to the same extent and with the same force and effect as though the witness appeared in person and testified in said trial.

Dated September 13, 1950.

/s/ C. K. CURTRIGHT,

/s CHARLES R. GARRY,

Attorneys for Plaintiff.

BROBECK, PHLEGER &  
HARRISON,

Attorneys for Defendant,  
Fibreboard Products, Inc.

[Title of District Court and Cause.]

### DEPOSITION OF E. R. UTLEY

I, Leslie Ford, a Notary Public in and for the County of Durham, State of North Carolina, do hereby certify that, within the jurisdiction of my authority, on September 15, 1950, at 4:00 p.m., pursuant to Stipulation attached hereto, which was entered into in the above-numbered and styled cause, dated September 13, 1950, personally appeared E. R. Utley, a witness for the defendant named in said stipulation; and the said E. R. Utley being by me first duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth concerning the matter in controversy, did depose and say, in answer to the direct interrogatories propounded in this case, read to him by me:

#### Questions Upon Direct Examination of E. R. Utley Upon Written Deposition.

1. State your name.
2. State your address.
3. By whom are you employed?
4. In what capacity are you employed?
5. By whom were you employed from the middle of August, 1948, until the middle of November of that year?
6. In what capacity were you employed during the period referred to in Interrogatory No. 5?



7. What were your duties during the employment referred to in Interrogatory No. 5?

8. Where did you perform your duties during the period referred to?

9. Did you have authority to employ an elevator mechanic's helper or an elevator erector's helper?

10. Did you employ Mr. Willie Hugh Townsend during the month of August, 1948?

11. If the answer to Interrogatory 10 is in the affirmative, please state the date when you employed Mr. Townsend.

12. State whether the contract of employment with Mr. Townsend was written or oral.

13. If the contract of employment was written, please attach it to your answers to these interrogatories, or, if the original is not available, explain where it is and attach a copy.

14. If the contract of employment was oral, please state its terms and conditions, including wages, hours, place or places of employment, job title or classification, duration of employment and any other provisions.

15. Is there any custom in the elevator construction business with respect to hiring helpers?

16. If the answer to Interrogatory 15 is in the affirmative, please state what the custom is.

17. State whether Mr. Townsend was employed on construction work.

18. Please state whether Mr. Townsend was employed on a temporary or permanent basis.

19. If there were any changes in the terms or conditions of Mr. Townsend's employment between the date of employment in August and the termination of his employment, please state the changes.

20. State the location of the job or jobs on which Mr. Townsend was employed.

21. State the date of completion of the job or jobs.

22. State the date upon which Mr. Townsend's employment was terminated.

#### Questions Upon Cross-Examination of E. R. Utley Upon Written Deposition

1. What is your present capacity in your employment and what duties do they entail?

2. What sum per hour did Mr. Townsend earn at the time he terminated his employment?

3. What was Mr. Townsend's total earning for the five months immediately preceding the termination of his employment?

4. Did Mr. Townsend resign his position or was he discharged?

5. Could Mr. Townsend have continued his employment with you, and if so, for what period of time?

6. Please state your opinion of Mr. Townsend as an employee as to the following:

- a. Conscientiousness.
- b. Ability to take orders and directions.
- c. Ability to get along with fellow workers.
- d. Reliability.
- e. Honesty and trustworthiness.
- f. Leadership.
- g. Initiative.
- h. Sobriety.
- i. Loyalty.
- j. Efficiency.

Answer to Direct Interrogatory No. 1: E. R. Utley.

Answer to Direct Interrogatory No. 2: 1116 Ninth Street, Durham, North Carolina.

Answer to Direct Interrogatory No. 3: I am employed by Otis Elevator Company.

Answer to Direct Interrogatory No. 4: Local Representative in Durham.

Answer to Direct Interrogatory No. 5: By Otis Elevator Company.

Answer to Direct Interrogatory No. 6: I was Elevator Erector.

Answer to Direct Interrogatory No. 7: Servicing and installing elevators.

Answer to Direct Interrogatory No. 8: I was working out of our Zone Office, which is in At-

lanta, and among other places, in Tuscaloosa, Alabama.

Answer to Direct Interrogatory No. 9: An elevator erector and elevator mechanic is the same. Sure.

Answer to Direct Interrogatory No. 10: Yes.

Answer to Direct Interrogatory No. 11: About August 29, 1948.

Answer to Direct Interrogatory No. 12: Part written and part oral.

Answer to Direct Interrogatory No. 13: I have no copy. The original is kept with the pay roll records in the Atlanta Office.

Answer to Direct Interrogatory No. 14: We were to pay him about \$1.57 per hour eight hours per day or forty hours per week to work in Tuscaloosa, Alabama, as elevator erector's helper. Nothing was said about duration of his employment.

Answer to Direct Interrogatory No. 15: Yes.

Answer to Direct Interrogatory No. 16: When an elevator constructor does not have regular experienced assistant elevator constructors, he hires the best assistants he can find for varying periods of time.

Answer to Direct Interrogatory No. 17: Yes, he was.

Answer to Direct Interrogatory No. 18: On a temporary basis.



Answer to Direct Interrogatory No. 19: There were no changes.

Answer to Direct Interrogatory No. 20: Bryce Hospital, University of Alabama, and Gulf States Paper Corporation, all in Tuscaloosa, Alabama.

Answer to Direct Interrogatory No. 21: All the jobs in Tuscaloosa were completed around November 15, 1948.

Answer to Direct Interrogatory No. 22: About a week and a half before the jobs were completed.

And said witness did depose and say, in answer to the cross-interrogatories propounded in this case, read to him by me:

Answer to Cross-Interrogatory No. 1: Local Representative in Durham, North Carolina, of Otis Elevator Company. Service, sales, and general representation.

Answer to Cross-Interrogatory No. 2: About \$1.57 per hour.

Answer to Cross-Interrogatory No. 3: I do not have that information.

Answer to Cross-Interrogatory No. 4: He resigned.

Answer to Cross-Interrogatory No. 5: He could have continued his employment with us but for what period of time I can't say as he resigned before the Tuscaloosa jobs were finished.

Answer to Cross-Interrogatory No. 6: My opinion of Mr. Townsend as an employee was:

- a. He really was conscientious.
- b. His ability to take orders was good.
- c. His ability to get along with fellow workers was good.
- d. Reliability—good.
- e. As far as I know—good.
- f. Leadership—fair.
- g. Initiative—fair.
- h. Fair.
- i. Good.
- j. Good.

And further he answers not.

/s/ E. R. UTLEY.

Subscribed and sworn to before me this 16th day of September, 1950.

[Seal]      /s/ LESLIE FORD,  
Notary Public.

My Commission Expires 10-9-51.

I do hereby further certify that the answers of the witness to the interrogatories were stenographically taken and transcribed, in the exact language of the witness; and, after they had been fully transcribed, were read by the said E. R. Utley and signed in my presence; and I further certify that

I am not a relative, or employee, or counsel or attorney to either of the parties.

[Seal]      /s/ LESLIE FORD,  
Notary Public.

My Commission Expires 10-9-51.

[Endorsed]: Filed September 20, 1950.

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[Title of District Court and Cause.]

### ORDER FOR JUDGMENT

Upon presentation of findings of fact and conclusions of law it is hereby ordered that judgment be entered in favor of the plaintiff and against the defendant in the sum of \$2,530.25, together with the plaintiff's costs of suit incurred herein.

It is the opinion of the court that a contract of employment was entered into between plaintiff and defendant, and pursuant thereto the plaintiff quit his job in Alabama and came to California to perform this contract of employment. When the employment for which he contracted became available he was refused employment. Under the authority of *Millsap v. National Funding Corp.*, 57 C.A. (2d) 772; and *Seifert v. Arnold Bros., Inc.*, 138 C.A. 324, the contract of employment must be considered to be permanent, and in accordance with the *Mill-sap* case, *supra*, two years must be considered to be a reasonable period of time. The court is of the opinion that during the two year period following November 2, 1949, when the plaintiff presented

himself ready, willing and able to perform the contract of employment, he would have earned \$7,-176.00. During this two-year period, if he continues in his present occupation, he will have earned \$4,645.75, leaving a loss in earnings for the two-year period in the sum of \$2,530.25.

The court is of the opinion that the plaintiff is not entitled to recover for traveling expenses from Alabama to California, because at the time of the contract of employment the defendant did not offer to pay his traveling expenses as a part of the contract of employment. And for the same reason neither is the plaintiff entitled to recover for any of the other items of special damages which he has alleged in his complaint.

Let the counsel for the plaintiff present findings of fact and conclusions of law in accordance herewith.

Dated June 25, 1951.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed June 25, 1951.



[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above-entitled cause came on regularly for trial before this Court sitting without a jury on the 11th and 12th days of October, 1950, C. K. Curtright and Charles R. Garry appearing as attorneys for plaintiff, and Brobeck, Phleger & Harrison, by Samuel L. Holmes appearing as attorneys for defendant Fibreboard Products, Inc., and the Court having heard all the testimony and having examined the proofs offered by the parties, and the cause having been duly submitted, and the Court being fully advised in the premises, finds as follows:

Findings of Fact

1. That it is true that on or about the 18th day of October, 1948, the plaintiff and the defendant Fibreboard Products, Inc., entered into an oral and written permanent contract of employment whereby the parties mutually agreed that plaintiff should be employed by defendant corporation in the capacity of a recovery operator in the Recovery Department of the San Joaquin Division of said defendant corporation's newly constructed paper pulp mill plant at Antioch, California, said employment to commence when defendant's paper mill plant began operations, and to continue for so long as plaintiff's work was satisfactory, and that plaintiff's permanent position would be at the prevailing hourly rate of \$1.725 per hour, forty hours per

week, fifty-two weeks per year. It was further agreed that plaintiff would remove from the City of Tuscaloosa, Alabama, to Antioch, California, and pending the opening of defendant's paper pulp mill, said defendant would endeavor to find other employment for plaintiff.

2. That it is true that at the time of the agreement between the parties, defendant corporation was advertising for and in need of experienced paper pulp men, and was creating a labor pool of experienced pulp mill men in contemplation of the opening of the pulp mill plant in Antioch, California.

3. That it is true that plaintiff had had many years of experience in many phases of the paper pulp mill industry and was a seasoned and experienced recovery operator.

4. That it is true that plaintiff was gainfully employed in Tuscaloosa, Alabama, at the time of the agreement and that he did leave said employment and did remove with his family to Antioch, California, and that he did pay his own expenses for said move, and plaintiff did dispose of his furniture and personal belongings in order to remove to defendant's place of employment.

5. That it is true that on or about November 2, 1949, defendant corporation's paper pulp mill was ready for operation, at which time, plaintiff did present himself ready, willing, and able to perform his part of the contract of employment.

6. That it is true that when the employment for which plaintiff was contracted became available, defendant corporation refused, and does now refuse, to fulfill the terms of the said contract, and refused, and does now refuse, to employ the plaintiff.

7. That it is true that plaintiff has performed all of the things and matters on his part to be performed under the terms of the said contract and that defendant corporation has wholly failed to perform the things and matters on its part to be performed under the said contract of employment.

8. That it is true that a contract for permanent employment in the State of California is a contract to retain in employment for a reasonable period of time, and that a reasonable period of time is two years.

9. That it is true that had plaintiff entered into the employ of defendant corporation as contracted at the time plaintiff presented himself ready, willing, and able, to the said defendant corporation, he would have earned the sum of \$7,176.00 during a two year period. If plaintiff continues in his present occupation, he will have earned \$4,645.75, or sustained a loss of earnings for the two year period in the sum of \$2,530.25.

From the foregoing facts, the Court concludes:

#### Conclusions of Law

1. That defendant corporation did breach the contract of employment and that plaintiff is en-

titled to judgment in the sum of \$2,530.24, together with his costs of suit.

Let judgment be entered accordingly.

Dated this 17th day of September, 1951.

/s/ OLIVER J. CARTER,  
United States District Judge.

Receipt of Copy acknowledged.

Lodged September 11, 1951.

[Endorsed]: Filed September 17, 1951.

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In the United States District Court for the  
Northern District of California, Southern Division

No. 29449

W. H. TOWNSEND,

Plaintiff,

vs.

FIBREBOARD PRODUCTS, INC., et al.,

Defendants.

### JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury, on the 11th and 12th days of October, 1950, Messrs. Charles R. Garry and C. K. Curtright appeared as attorneys for plaintiff, and Messrs. Brobeck, Phleger & Harrison, by Samuel L. Holmes appeared as attorneys for



defendant Fibreboard Products, Inc., and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That plaintiff have judgment against the defendant Fibreboard Products, Inc., in the sum of \$2,530.25, with interest thereon at the rate of seven per cent per annum from date hereof until paid.

2. That plaintiff have judgment against defendant Fibreboard Products, Inc., for his costs herein taxed at \$35.75.

Dated this 20th day of September, 1951.

/s/ OLIVER J. CARTER,  
United States District Judge.

Lodged August 31, 1951.

[Endorsed]: Filed September 20, 1951.

Entered September 20, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given this 3rd day of October, 1951, that Fibreboard Products, Inc., one of the defendants above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 20, 1951.

/s/ SAMUEL L. HOLMES,

BROBECK, PHLEGER &  
HARRISON,

Attorneys for Appellant  
Fibreboard Products, Inc.

[Endorsed]: Filed October 3, 1951.

In the Southern Division of the United States  
District Court for the Northern Division of  
California

No. 29449

W. H. TOWNSEND,

Plaintiff,

vs.

FIBREBOARD PRODUCTS, INC., et al.,

Defendants.

REPORTER'S TRANSCRIPT

Wednesday, October 11, 1950

Before: Oliver J. Carter, Judge.

Appearances:

For the Plaintiff:

C. K. CURTRIGHT ESQ., by  
CHARLES R. GARRY, ESQ.

For the Defendants:

BROBECK, PHLEGER & HARRISON,  
by  
SAMUEL L. HOLMES, ESQ., and  
MALCOLM TUFT, ESQ.

## WILLIE HENRY TOWNSEND

the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: Would you state your name and address to the Court?

A. Willie H. Townsend, 511 Third Street, Antioch, California.

## Direct Examination

By Mr. Garry:

Q. Mr. Townsend, you are the plaintiff in this action, are you not? A. Yes, sir.

Q. You live in Antioch, California?

A. Yes.

Q. How long have you been there?

A. Since November 15, 1948.

Q. Before that where did you live?

A. 2124 Eighth Street, Tuscaloosa, Alabama.

Q. Tuscaloosa, Alabama?

A. That is correct.

Q. How did you come to California? I mean, how did you come to change your place of residence?

A. Well, I saw a notice in the Southern Pulp & Paper Manufacturer Journal out of Atlanta advertising for a new [2\*] Pacific Coast kraft pulp mill and I answered the ad, and on or about the 4th or 5th of September, 1948, I received a letter dated September 1, 1948, from Mr. Stitt, stating that my application to the trade journal in Atlanta had been forwarded along with the recommendation from the North Carolina Pulp & Paper Company.

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.



(Testimony of Willie Henry Townsend.)

Q. On August 26th, 1948, you said you sent them a letter, is that right?

A. That is correct.

Q. I show you a letter and ask you if that is the letter that you sent?           A. That is right.

\* \* \*

The Clerk: Plaintiff's Exhibit 1 in evidence.

(Whereupon letter referred to above was marked Plaintiff's Exhibit No. 1 and received in evidence.) [3]

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PLAINTIFF'S EXHIBIT No. 1

Tuscaloosa, Ala.

Aug. 26, 1948

Box 24,  
Southern Pulp & Paper Manufacturer,  
75 Third St. N. W.,  
Atlanta, Ga.

Dear Sir:

Would like to make application for one of the jobs in the new Pacific Coast Kraft Pulp & Paper Mill that you expect to start up around Dec. 1st, 1948. I have 20 years experience in kraft pulp mill work; having started with the Gulf States Paper Co., here, at Tuscaloosa, Ala., and served as a foreman at N. C. Pulp Co. Plant at Plymouth, N. C. Also served as Recovery Plant Foreman and Tour Foreman, and General Foreman for the N. C. Pulp Co. for nine years.

(Testimony of Willie Henry Townsend.)

I am married, have wife and three daughters. Do not drink and can furnish best of reference. Have never missed a day's work during the past 20 years of pulp mill work.

I would appreciate a job with you people. Will close with best regards, and hoping that I will hear from you in the near future.

I am enclosing a copy of letter of recommendation from the N. C. Pulp Co.

With best regards I remain yours truly,

W. H. TOWNSEND,

Apt. 23A Druid Gardens,  
Tuscaloosa, Ala.

P.S.

I can report for work at any time and I will take any job you have to offer me.

Thanks.

Received August 31, 1948.

[Endorsed]: Filed October 11, 1950.

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Q. Did you receive a reply from the letter I just now read to the Court?

A. The next reply I had from that was a letter dated September 1st, signed by Mr. Claude Stitt, manager, San Joaquin Division, Fibreboard Products, Inc., Antioch, California.

Q. That is these defendants both here?

(Testimony of Willie Henry Townsend.)

A. That is correct.

Q. I show you this letter and ask you if that is a copy of a letter you received from them?

A. That is correct. That is a copy of the letter that I received on about September 4th or 5th, I received that. [5]

\* \* \*

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The letter referred to was marked Plaintiff's Exhibit 2 in evidence.) [6]

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PLAINTIFF'S EXHIBIT No. 2

September 1, 1948

Mr. W. H. Townsend,  
23A Druid Gardens,  
Tuscaloosa, Alabama.

Subject: Possibility of Employment in Pulp Mill.

Dear Mr. Townsend:

Your letter of August 26th to the Southern Pulp and Paper Manufacturer has been referred to the undersigned.

In connection with said letter we are enclosing one of our standard application for employment blanks which we would like to have you fill out and return at your earliest convenience.

Based on your experience we feel that you can be reasonably assured that we will have some position available for you. However, before making

(Testimony of Willie Henry Townsend.)

actual commitments we are waiting until our Pulp Mill Superintendent gets on the job and he will have as one of his first responsibilities the job of lining up the various crews. For your information a Mr. T. Lindley will be our Pulp Mill Superintendent and he will be on the job as of October 1st.

Feeling that you may want for your record the recommendation given you by Mr. Rasmuson of the North Carolina Pulp Company we are enclosing same with this letter. However, we have taken the liberty of making a copy of said reference for our files.

Thanking you for your inquiry and awaiting the return of the filled-out application blank, we remain,

Yours very truly,

FIBREBOARD  
PRODUCTS, INC.,  
San Joaquin Division.

C. M. STITT,  
Plant Manager.

CMS:ZR

Encls.

[Endorsed]: Filed October 11, 1950.

\* \* \*

Q. Now, no, Mr. Townsend, after you received the letter of September 1, what did you do? [7]

A. I filled out this application; made application for tour foreman's job, due to the fact that I had



(Testimony of Willie Henry Townsend.)

been tour foreman with the North Carolina Pulp & Paper covering the entire pulp mill.

And then on the 18th of October I called Mr. Lindley on the telephone, and he told me that he had a copy of my letter of recommendation, also my letter to Mr. Stitt, and a copy of Mr. Stitt's letter to me; that they was looking for experienced kraft pulp mill men, and a man with 20 years, it seemed like I ought to be qualified, and he tell me that if I wanted a position out there that they would place me in one of the other plants until such time as they could use me in the new mill.

I asked him, would it be a permanent job, and he told me that I could depend on it to be a permanent job. I told him in that case I would bring my family and I would come prepared to make California my home from now on; that I was getting old, I wanted to stick in one place and settle down. He asked me did I have transportation. I said yes, sir, I had enough money. He said it would be refunded. As far as my driving a car out here, I didn't tell Mr. Lindley that.

Q. Please state the conversation and don't anticipate what someone else will say. Please don't do that. I think we will get along better.

A. So I told Mr. Lindley that I would report for work on the [8] 15th of November, 1948.

Q. This is over the telephone on October 18th, 1948?

A. Yes, sir, that's right.

Q. Had you sent in your application prior to that time?

(Testimony of Willie Henry Townsend.)

A. Yes, sir, I sent in my application in September.

Q. Do you recall what date in September?

A. It must have been around between the 6th and the 10th.

Mr. Garry: Do you have a copy of the application?

Mr. Holmes: Yes, I do, but there have been some markings put on it which I preferred to have a witness explain. I intended to offer it as my exhibit.

Mr. Garry: That is all right.

Mr. Holmes: After these additional markings on it had been explained.

The Court: All right.

Mr. Garry: That is perfectly all right.

The Court: You proceed with your case as you see fit.

Q. (By Mr. Garry): This was the conversation you had on October 18th? A. Yes.

Q. Did you hear from any of the defendants after that?

A. I received a letter on or about October 24th from—dated October 19th, from Mr. Lindley.

Q. Is this the letter that you received from the defendants, Mr. Townsend (showing)? [9]

A. That is the letter I received on or about October 24th.

\* \* \*

The Clerk: The Plaintiff's Exhibit 3 in evidence.

(Testimony of Willie Henry Townsend.)

(Letter referred to was marked Plaintiff's Exhibit No. 3 in evidence.) [10]

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PLAINTIFF'S EXHIBIT No. 3

Fibreboard Products, Inc.

San Francisco

San Joaquin Division

October 19, 1948.

Mr. W. H. Townsend,  
Apt. 23A Druid Gardens,  
Tuscaloosa, Alabama.

Subject: Possibility of Employment in Recovery Department.

Dear Mr. Townsend:

We were pleased to receive your telephone call of October 18th.

In line with our conversation the new mill is still under construction and it will be about the first of March before actual operations begin. However, if it is your desire to come to the coast at an earlier date we will place you in one of our mills at whatever they might have for you until we begin operating.

Housing, as far as rentals are concerned, is very critical. However there are homes available for purchase ranging in price from \$6,500 to \$9,000.

(Testimony of Willie Henry Townsend.)

Thanking you for your telephone call, we remain,

Yours very truly,

FIBREBOARD

PRODUCTS, INC.,

San Joaquin Division,

/s/ M. T. LINDLEY,

M. T. Lindley,

Pulp Mill Superintendent.

MTL:GR

cc N. M. Brisbois

T. N. Bland

G. B. McCuish

[Endorsed]: Filed October 11, 1950.

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Q. Did you do anything after you received that letter in furtherance of your coming to California?

A. No, I didn't. I had told him on the telephone on the 18th that I would report for work, for duty on November 15th. So I quit my job with Otis Elevator on or about the 20th of October. I tell Mr. Utey that I was leaving on or about [11] November 7 for California.

The Court: When was that that you quit?

A. I turned in my resignation on or about the 20th. My last day's work with Otis Elevator was November 7 at noon.

Q. (By Mr. Garry): You were working for the Otis Elevator Company at the time? A. Yes.



(Testimony of Willie Henry Townsend.)

Q. What were you doing there?

A. I was elevator erector helper at \$1.58 an hour, double time for all overtime.

Q. How long had you been working there?

A. I had been working for them a little better than three months. I think I went to work for them in August?

Q. And you left your employment at that time?

A. That is correct.

Q. And then what did you do?

A. Well, on Sunday morning, November 6th, my mother brought a Birmingham News Age Herald in and told me there was an ad——

Q. Mr. Townsend, so that there won't be any objection from the Court or the attorneys on the other side, please don't tell us what some other person said, except what the defendants ever said to you.

A. I had told Mr. Utley November 7th would be my last day. On Sunday, November 6th, I saw in the Birmingham News Age Herald an ad where a lady was wanting somebody to drive a car [12] to Fort Mason, California. She inserted this ad on a Saturday; it came out Sunday morning and gave the telephone number in Birmingham. I called the lady on the telephone, told the lady I had permission to be in Antioch on November 15th to go to work for Fibreboard Products, Inc., and told her that I could furnish her with references, if she hadn't engaged somebody to drive this Pontiac to drive this car to Fort Mason, that I would be glad to

(Testimony of Willie Henry Townsend.)

come to Birmingham and talk with her in regards to bringing it out here for her. I told her I had a wife and three daughters, if I brought the car out here for her I would want to bring my family along with me. So a brother who is a superintendent of the Southside Post Office drove me to Birmingham, Alabama, and I talked to the lady, that due to—after she read this letter from Mr. Stitt and Mr. Lindley, so she figured I had a position in California, so she granted me permission to drive out the Pontiac car and bring my wife and daughters, and that was my mode of transportation to California.

Mr. Holmes: I move to strike that portion of the answer which has to do with what other people figured or said.

The Court: It will go out. [13]

\* \* \*

Q. Mr. Townsend, you drove a vehicle, did you, that you engaged some time in November?

A. That is true.

Q. Now what day did you get the automobile?

A. On the 8th day of November.

Q. On the 8th day of November you started toward California, is that correct?

A. That is true.

Q. I notice in your interrogatories the defendants propounded to you that you enumerated the total expenses at \$209.35; is that correct?

A. That is the actual meals and gas and oil.

(Testimony of Willie Henry Townsend.)

Q. You have expended that money bringing your family and yourself in this automobile?

A. That is correct.

The Court: What is that figure again?

Mr. Garry: \$209.35.

Q. Is that the total amount that you spent in transportation down here?

A. That was all I spent on transportation. I spent more than that, you know, the kids have got to buy something; but that is the actual cost of transportation.

Q. What else did you do in coming out to California after you received this letter from Mr. Lindley on the 20th day of October, 1948? [14]

\* \* \*

A. We disposed of all our household furnishings due to the fact that we had inquired as to the cost of bringing it out here. It was prohibitive. It would cost five or six hundred dollars to ship it out. I didn't have that much money to pay for it, and I felt that I could dispose of it for money that would help me pay my debts to a certain extent, and leave me money to make the trip and enough—and part of the money that I got from the sale of the furniture we used. Some furniture we sold after we arrived in November. We had left it with my mother, and she disposed of it, and altogether—

Q. How much did you have?

Mr. Holmes: We object to that as calling for a conclusion of the witness. [18]

\* \* \*



(Testimony of Willie Henry Townsend.)

The Court: I will overrule the objection.

A. I married in 1923. I bought one bedroom set from C. W. Allen, Tuscaloosa, Alabama, who has been in business over the past 55 years, business in furniture, and they are still there, and the number of the place is 2327—2227 is the number, I think, on the corner of 23rd Avenue and 6th Street. I bought a bedroom suite from them and paid between four and five hundred dollars for it. That was in 1923. It was pre-war stuff. I bought the furniture from C. W. Allen, and I bought it from the Home Furniture Company, and as I say, I accumulated this [19] over a period of approximately 25 years. The actual cost—I don't have that good a memory; I don't remember that it cost, but I had five rooms of furniture, enough to furnish five rooms before I came to California, and it cost me better than \$2,000, your Honor, and I bought it over a period of years. I ran up a bill in Antioch, and when these people didn't give me a job, I said to the people there, "Come on over; you will have to take your furniture back." He said, "Let me look at the bill." He said, "Townsend, you do as you like about that bill; but come on over to the office."

Mr. Holmes: Your Honor, I move that that answer be stricken out.

The Court: That part of the answer that refers to what this furniture company said to him and what he said to them will go out.



(Testimony of Willie Henry Townsend.)

The Witness: I haven't paid them anything since these people let me go.

The Court: Just a moment. You answer the questions propounded to you by counsel.

Q. (By Mr. Garry): You had five rooms of furniture, is that correct? A. Yes.

Q. At Tuscaloosa? A. Yes, sir.

Q. On or about the end of October, 1948? [20]

A. Yes, sir. [21]

\* \* \*

Q. (By Mr. Garry): What did you have in the five rooms of furniture, Mr. Townsend?

A. Well, I had a kitchen outfit and a dining room set, a rug; and I had a bedroom set and three iron beds and a living room bed and chairs and a sofa.

Q. Anything else?

A. Well, there was some mirrors. In other words, what an ordinary person would have in a five-room home I had in mine, that I had accumulated over a period of 25 years.

Q. And do you know what you paid for the total amount of furniture you had?

A. No, sir, I don't.

Q. Do you know what you had to pay the same equivalent amount of furniture?

A. I haven't duplicated it yet.

\* \* \*

The Court: Do you have any approximate idea of how [22] much you paid for it?

(Testimony of Willie Henry Townsend.)

A. I would say \$2500, your Honor.

Q. That is your only independent recollection?

A. Yes.

Q. (By Mr. Garry): Some of this furniture you had since 1923 and others you discarded and replaced as the years went on; is that true?

A. That is correct. Some of it my wife inherited from her father's estate.

Q. You are not counting that as part of the \$2500, are you?

\* \* \*

A. No, sir, I am not. That was a bookcase with a bunch of old books.

Q. Your best estimate is that this furniture that you purchased yourself over a period of years cost \$2500?

A. Yes, sir.

Q. And at the time, the end of October, 1948, what shape was that furniture in?

A. It was in good shape.

Q. You mean you were able to use it?

A. Yes, sir.

Q. What did you sell this furniture for? [23]

\* \* \*

A. As I said in my previous testimony, that we disposed of most of it before we left, but some of it was sold after we left Tuscaloosa, Alabama, and it was less than \$900 altogether.

The Court: How much was it, about?

A. The exact amount?

(Testimony of Willie Henry Townsend.)

Q. Approximately, as near as you can give it to me.

A. Between eight and nine hundred dollars, your Honor.

Q. (By Mr. Garry): Now, Mr. Townsend, you say you have been in paper work for 20 years?

A. I worked in kraft pulp mills for 20 years since 1928, and with the exception of two years that I was union representative for the International Brotherhood of Pulp and Sulphite Paper Mill Workers and Operating Engineers, which have charters in the paper mills and paper mills throughout the South.

Q. Which years did you work for the International?      A. '46 to '47.

Q. Which years did you work in the actual paper industry?

A. I went to work for the Gulf States Paper Company on the 6th day of June, 1928; I left them in 1935 and went to work with the North Carolina Pulp and worked with them until the 14th of April, 1945. [24]

Q. Whom did you go to work for after that?

A. I went to work for the Operating Engineers.

Q. As business agent?

A. No, when I left the North Carolina Pulp and Paper Company I went to work for the Burlington Railroad in Lincoln, Nebraska.

Q. When did you go to work as business agent?

A. I went to work for them, I think, the 1st of May, 1946.

(Testimony of Willie Henry Townsend.)

Q. Where did you go to work?

A. I worked with Division 1 of the Pulp Sulphite and Paper Workers, A F of L.

Q. As representative for them?

A. Field representative, covering the paper industry in the South.

Q. Tell us what happened when you came to California, Mr. Townsend.

A. I arrived here on the night of the 14th of February and went to Mr. Lindley's office on the morning of the 15th of November and introduced——

Q. That is 1949, is it not?

A. 1948. And I introduced myself to Mr. Lindley. And he told me, he said, "Well, all salaried jobs have been filled, Townsend; you can pick out any job you want in the pulp mill and I will be glad to put you there." I said, "Mr. Lindley, due to the fact I have 13 years in the recovery department, I will apply for a recovery operator's job." That was the understanding. [25] He said, "I will see if I can get you a job in a week or ten days in the San Joaquin Division." I says, "Mr. Lindley, I was bringing my family up here to live in Antioch, and I only got seven bucks on hand." I said, "Don't you have a plant here in Antioch, in the Antioch Division?" He said, "Yes." He said, "It may take a few days to get you located." I said, "That's all right; I am willing to wait." So I waited approximately one week; I think it was on either the 22nd or 23rd I went to work for



(Testimony of Willie Henry Townsend.)

Mr. Van Voorhis, the gentleman sitting back there on the seat—I wouldn't be positive—either the 22nd or 23rd of November, 1948, I went to work for him as a Class B helper in the mechanical department.

Q. Let us get to the conversation you had with Mr. Lindley on November 15, 1948. You say he offered you a recovery operator's job at that time?

A. He told me that tour foremen's jobs had all been promised in the pulp mill but, he says, "You can pick any job you want in the pulp mill and I will give it to you; the first vacancy as tour foreman I will give you consideration, because you are an experienced man." He asked me about how long I had worked in various departments of the mill, and he also asked me did I want a digest cook's job. I told him I preferred a recovery operator; I felt I could be of more service to the company because I had more service as a recovery operator.

Q. When did he tell you he would have a recovery operator's [26] job for you?

A. On the 15th of November he said as soon as the plant got ready to operate.

Q. That is the plant you came down here for?

A. Yes, sir, the San Joaquin Division.

Q. Did he tell you what that job paid?

A. He didn't tell me that particular day, no.

\* \* \*

Q. (By Mr. Garry): What did it pay October 14, 1949?      A. \$1.75 and 1/2 an hour.

\* \* \*

(Testimony of Willie Henry Townsend.)

Q. Do you know what it pays at the present time?

A. They got about a seven cent an hour increase.

Q. How much?

A. Seven cents an hour since that time.

Q. Did you discuss with him about your transportation fare on the 15th day of November?

A. No, sir. [27]

Q. You didn't discuss that subject with him?

A. No, sir.

Q. Then what happened, Mr. Townsend?

A. As I say, I went to work with Mr. Van Voorhis on about the 22nd or 23rd of November.

Q. Doing what?

A. Working in the mechanical department as Class B helper, \$1.54 an hour.

Q. You continued doing that until when?

A. September 2, 1949.

Q. Then what happened?

A. He called me in the office and told me my services were no longer needed.

Q. Who called you in the office?

A. Mr. Sanford, the manager.

Q. What did he say?

A. When I walked in he handed me a letter and said, "Your services are no longer required, and you can go in the office and get your pay." I told him, "being I am going to be in Antioch on the 7th, I would prefer to take my money on the 7th." I didn't open the letter, I just stuck it in my

(Testimony of Willie Henry Townsend.)

pocket, but I didn't even read the letter until I got out of the plant. The letter was from Mr. Van Voorhis stating that I was let out.

Q. You say this letter was given you on September 2, 1949?

A. By Mr. Sanford, the manager of the Antioch plant of [28] Fibreboard.

Q. Is this the letter that was given you, Mr. Townsend? (Showing the letter.)

A. Yes, that is the original letter that was given to me by Mr. Sanford, manager of the Antioch plant.

\* \* \*

The Clerk: Plaintiff's Exhibit 4 in evidence. [29]

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PLAINTIFF'S EXHIBIT No. 4

Fibreboard Products, Inc.  
Antioch, California

September 2nd, 1949

Mr. W. H. Townsend  
2602 Wills Ave.  
Antioch, California

Dear Sir:

During the last several months it has been our policy to give employment to applicants referred to us by the San Joaquin Division. Oftentimes extra jobs were made, men were placed on jobs above their qualifications, or given jobs which would have been filled with a more qualified type of employee either hired or preferably from our own ranks.

(Testimony of Willie Henry Townsend.)

Due to the curtailment of our Maintenance Department, and because of our responsibility to older employees, and as you were employed by request of the San Joaquin Division and given employment here until such time that the San Joaquin Division offered you employment, and as we are advised that you refused employment on Wednesday, August 31, 1949, at the San Joaquin Division, we find it necessary to terminate you as of this date.

Yours very truly,

FIBREBOARD  
PRODUCTS, INC.,  
Antioch Division,

/s/ WM. VAN VOORHIS,  
Plant Engineer.

W.VanVoorhis:MJ

CC: Int.Brotherhood Pulp, Sulphite & Papermill  
Workers, Local 249.

Attn: Mr. Renold Victor

Mr. George Coalter

[Endorsed]: Filed October 11, 1950.

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Q. When did you read that letter?

A. I didn't read it until after I left the plant.

Q. When was that? When did you leave?

A. September 2nd. The afternoon of September 2nd.



(Testimony of Willie Henry Townsend.)

Q. Did you do anything about that letter?

A. Yes, sir.

Q. What did you do?

A. On Saturday morning, September 3rd, I got the secretary of the local, George Colter, also a member of the shop committee, and went to Mr. Claude Stitt's office, at the San Joaquin Division of Fibreboard.

Q. What date was that?

A. September 3rd, on a Saturday morning, between ten and eleven o'clock.

Q. Yes. What happened? [30]

A. Well, I asked to see Mr. Stitt, and he told George and myself to come in. So we walked in. I told Mr. Claude that Mr. Lindley had told me the Sunday previous, on August 28th, that there would be no employment for me at the San Joaquin Division due to rumors.

Q. Just a minute. You had seen Mr. Lindley prior to September 2nd?

A. I called Mr. Lindley on the phone on a Thursday night, August 18th, and asked him when—on August 25th, it was, on Thursday, August 25th, and asked—told him that I had been waiting approximately ten months for that recovery operator's job that had been promised me. And he said, "Well, Townsend, well," he says, "I have been hearing a lot of stories about you." I said, "Wait a minute; that is exactly what you have probably been hearing, stories." He says, "Where are you?" I says, "I am at the San Joaquin plant working

(Testimony of Willie Henry Townsend.)

for Mr. Wolcott.” He says, “How about meeting me in my office Saturday?” I said, “All right, sir, I will be glad to. What time?” He says, “Nine o’clock.”

Q. What day was that?

A. That would be the 27th day of August on a Saturday.

Q. That he wanted to meet you?

A. He wanted to see me at his office at the San Joaquin Division. So I told Mr. Lindley that I would be there on a Saturday. I told Mr. Wolcott on a Friday that Mr. Lindley had [31] told me he wanted to see me at the San Joaquin plant; that he had been hearing a lot of stories about me, and I told Mr. Wolcott—I can remember the words—that “the way he talked, it looks like he was going to give me the gate before they ever opened up the plant. Mr. Wolcott said, “Well, Alabam”—that is what they called me at the old mill—he said, “Well, Alabam, if you get the gate out there, when you come back down here you will not be able to get a job here, because you was put here by the San Joaquin Division.” I says, “Well,” I says, “I know I haven’t done anything to cause me to get the gate down there.” He says, “No, but I know they will.”

Q. Who said that?

A. Both Mr. Wolcott and Mr. Van Voorhis.

Q. Who is Mr. Wolcott?

A. He is a master mechanic at the Antioch mill.

Mr. Holmes: I move to strike that portion of the answer pertaining to the various conversations

(Testimony of Willie Henry Townsend.)

about what would happen to him or what might happen to him. [32]

\* \* \*

The Court: Overruled.

The Witness: So Mr. Wolcott says, "OK, Alabama," he says, "if you get fired out there, you will get the gate down here, too."

Q. (By Mr. Garry): On what day was that?

A. This was Friday, the 26th day of August, 1946.

Q. Was this after the conversation you had had with Mr. Lindley?

A. I had a conversation with Mr. Lindley over the telephone Thursday night, August 25th.

Q. He told you to meet him at nine o'clock on Saturday, the 27th of August?

A. So I said, "Well, I'm sorry, Mister; I'm sorry, I'm just a poor boy trying to do the best I can." I said, "If you let me out, there is no hard feelings." So on a Saturday—on a Friday afternoon, then that said afternoon, then Mr. Wolcott came in and said, "I want you to work extra with the pipefitter; that will be time and a half." I called Mr. Lindley again Friday night and I told him I had a chance to make time and a half at the Antioch mill, how about making some other date? He said, "OK, make it Sunday."

"OK; I'll be there." On Sunday morning, the 28th of August, I met Mr. Lindley, and he said, "Let's go in Mr. McCuish's office." Mr. McCuish is the personnel manager of [33] Fibreboard. So



(Testimony of Willie Henry Townsend.)

we walked in Mr. McCuish's office, and he said, "Townsend, due to rumors I have heard about you, there will be no job for you at the San Joaquin Division of Fibreboard Products." I said, "I'm sorry, Mr. Lindley." I said, "You wouldn't know who stated those rumors, would you?"

"No, all I can tell you is there will be no employment."

"You don't realize it, Mr. Lindley, but you are pushing me out of this job here and also the job at the Antioch Division." He said, "Why?" I said, "Wolcott told me yesterday that if I didn't have no job here I wouldn't have one down there when I came back." He said, "Have you got no other job you can go to, Townsend?" I said, "No." He says, "Wait a minute, I got a good friend, superintendent of a paper mill in Springville, Oregon. When you get back home you call him on the telephone and tell him as a personal favor I want him to give you a job." So when I got home I called the gentleman and told him what Mr. Lindley said. He said, "How come you ain't going to work for Mr. Lindley?" I said, "I don't know; Mr. Lindley said he was letting me go on account of rumors. He has got the right to believe anything he likes." [34]

The Court: Just a moment.

Mr. Holmes: I move that the latter part of his answer go out.

The Court: The conversation that took place between him and the man in Oregon should go out.



(Testimony of Willie Henry Townsend.)

Q. Let me ask you a question; we can get along better that way. This was on the 28th day of August, 1948? [35] A. 1949.

Q. 1949? A. Yes.

Q. That Mr. Lindley had this conversation with you in the personnel manager's office?

A. That's right.

Q. He told you he wasn't going to put you to work? A. Yes.

Q. When the new plant opened up, is that correct? A. That's right.

Q. Did any other conversation take place with Mr. Lindley that day?

A. I shook hands with him and told him there was no hard feelings and any time I could be of any assistance to him I would be glad to help him in any way I could; that I would have to stay in Antioch because I didn't have no money to get out of there; I would probably be around for quite a while.

Q. Then what happened?

A. I went back to the Antioch mill on Monday.

Q. That would be August 29?

A. That's right. I told Mr. Wolcott ever I says—I explained to him what had happened. He said, "I will go and see Mr. Van Voorhis." He went and saw Mr. Van Voorhis. And anyway, a few minutes later he told me to come back. He said to work with George Machado, pipefitter. "It looks like you are going to be [36] able to stay on here." I told him, "That suits me, a day-time job. I have

(Testimony of Willie Henry Townsend.)

been working nights the last twenty years. I hope I stay here." Everything was lovely. And then I worked Monday, and Tuesday, and on Wednesday they asked me to go to the—about ten minutes to twelve Mr. Wolcott came to me and he said, "Townsend," he says, "I don't know what they want down there, but they want to see you at the San Joaquin Division at five minutes to one this afternoon."

Q. That would be August 31?

A. That's right. He says, "I don't know what they want down there. You will have to go to lunch now, and when you go and get your lunch, eat your lunch and go up to the San Joaquin Division and report to Mr. McCuish, the personnel man."

Q. So we will get this straight, the pulp work you were working in is at Antioch?

A. Yes, sir.

Q. And where is this so-called San Joaquin Division? A. It is in Antioch.

Q. Is it a different location?

A. About two and a half miles away.

Q. They are both fibreboard mills, is that correct? A. Yes.

Q. Go ahead with your story.

A. So I went and ate my lunch, went back and punched my card at 12:35, and drove out to the San Joaquin plant, and I got to [37] the San Joaquin plant about 20 minutes to one. About ten minutes to one Mr. Bob Fuller, the mill superintendent, came by. I was sitting by the clock where you punch in. So when he came by, he said, "How are

(Testimony of Willie Henry Townsend.)

you making out?" I says, "OK, Mr. Bob." One o'clock came, and Mr. McCuish didn't show up. I asked his secretary, "Mr. Wolcott told me to report back when I got through." She said, "Mr. McCuish just called me. He said he will be about ten minutes late getting back." Mr. McCuish, "Mr. Fuller wants to see you." I says, "There is something funny. Mr. Fuller just passed me about forty minutes ago."

She says, "He wants to see you over there in the paper mill." I said, "All right, I will go over there," and I saw him and Mr. Woods talking. I waited, and when they got done Mr. Bob Fuller said, "Townsend, I got a job for you." I says, "What is that? You know I am a pulp mill man. I have never worked in a paper mill. You know a man works in the pulp mill for twenty years he can't do much else." I says, "What kind of a job?"

"Operating a broke baler." I says, "Wait a minute, Mr. Bob. You didn't know that Mr. Lindley told me last Sunday that there would be no employment for me at the San Joaquin Division of Fibreboard?" He said, "No, did he tell you that?" I said, "Yes, he told me that last Sunday morning." He said, "That makes a difference there. They told me you didn't want a job." [38] I said, "Mr. Bob, I am getting \$1.54 an hour and working overtime, and this broke baler is \$1.42 an hour with no overtime." He says, "If you are working—they told me you wasn't working. Also I didn't know Mr. Lindley told you there would be no employ-



(Testimony of Willie Henry Townsend.)

ment." I said, "That's right. Under them conditions, will you give the job to somebody else? This fellow Fisher has been staying here since February 10."

Q. In other words Mr. Fuller at that time on Wednesday, August 31—— A. Yes.

Q. Told you that in this paper mill he would give you a job as broke millwork?

A. Broke bale operator.

Q. Broke bale operator? A. Yes, sir.

Q. At \$1.42? A. \$1.42½.

Q. \$1.42½ an hour? A. Yes.

Q. You were already earning——

A. \$1.54.

Q. With overtime? A. Yes, sir.

Q. Time and a half overtime, is that correct?

A. Yes, that is correct. [39]

Q. Did you have any further conversations with the defendants that day? A. Yes, sir.

Q. When was that?

A. When I came out—when Mr. Bob told me that there was a misinterpretation; that he had been told I didn't have no job; he says, "I don't blame you; I wouldn't quit a \$1.54 job to go to work at \$1.42½. Under them conditions I will give somebody else the job." I asked him how about giving it to this George Fisher, that he had been staying around since February looking for a job.

Q. Let us limit ourselves to matters concerning you.

A. When I came out of the plant I went in the



(Testimony of Willie Henry Townsend.)

office and told Mr. McCuish that I was going to send Fisher up for that job. Mr. McCuish said, "Well, I don't know. I guess somebody told you some of the things that were said about you." I said, "Yes, they have, if you want to know."

Q. This is Mr. McCuish? A. That's right.

Q. What does he do?

A. He is the personnel manager of the San Joaquin Division.

Q. Go ahead.

A. So I went back to the old Antioch mill. I arrived there at five minutes to three. When I went in I saw Mr. Van Voorhis and I said, "Gentlemen, I have wasted two hours of somebody's [40] time." I said, "I have been out there on a wild-goose chase. When I punch my card this afternoon at five o'clock do I put down six hours or eight hours? I don't want any question come up anyway because there is enough stories and rumors going around about me; I don't know what it is all about, but I want to keep the record clear. I haven't did any mechanical labor since twelve o'clock. When I make out my time card do I put down eight hours or six hours?"

Mr. Wolcott then told Mr. Voorhis, "Mr. Van Voorhis," he said, "I think he ought to put down eight hours."

Mr. Van Voorhis said, "OK, you put down eight hours." I said, "Thank you." I went back to work. That was Wednesday. I worked Wednesday, Thursday and Friday, and Friday they called me in and told me I was washed up.

(Testimony of Willie Henry Townsend.)

Q. That was when you got that letter, Exhibit 4, I believe?      A. That's right, on September 2.

Q. Prior to this time, Mr. Townsend, did you have any discussion with any of the defendants in reference to your transportation fare?

A. On August 14 I was sweeping up, working as a janitor; I had been sent out from Antioch on a seven-day assignment as janitor and cleanup man, and I was sweeping up in the machine room.

Q. At the San Joaquin plant?

A. San Joaquin plant. And I asked Claude Stitt when I could expect my transportation. He told me, "It won't be long you [41] will be operating that recovery machine over there. I can't pay you your transportation until you go to work for the San Joaquin plant. You haven't worked for us yet." I said, "OK, that is fine."

Q. Mr. Stitt is the gentleman who wrote you on September 1?      A. Yes.

Q. In the letter dated September 1, 1948?

A. Yes.

Q. At Tuscaloosa?      A. Alabama.

Q. Alabama, is that correct?

A. That is correct.

Q. This conversation you had was August 14, 1949?      A. On a Sunday, yes, sir.

Q. And he told you that your transportation would be paid?

A. I couldn't get it until I went to work for the San Joaquin Division.

Q. In the recovery room?

(Testimony of Willie Henry Townsend.)

A. That's right.

Q. And they hadn't opened up?

A. Yes, sir.

Q. He told you that?           A. Yes, sir.

Q. Now, after you received this letter on September 2, what if anything did you do with the defendants? Did you have any [42] further conversation with them?

A. I went to see Mr. Smith on Saturday, September 3.

Q. What happened then?

A. George Colter, one of the members of the shop committee from the Antioch mill, went with me, and I told Mr. Stitt, I says, "Mr. Clark, it looks like they are pushing me around here for no reason at all. I don't know what it is all about." I had lost out in the Antioch and the San Joaquin Division. He says, "What happened?" I says, "Mr. Lindley told me last Sunday there would be no employment here; then yesterday afternoon I was let out from the Antioch mill." And Mr. Stitt said, "Well, Mr. Lindley didn't have authority to tell you that you wouldn't have no employment here." I said, "Nevertheless, he did tell me that."

Q. This was on the third day of September?

A. Yes, sir.

Q. That Mr. Stitt told you that?

A. In Mr. Stitt's office, yes, sir. So he said, "Mr.—and Mr. Fuller are on an appeal committee." I said, "Do you mind if I appeal to those gentlemen, and let us clear this thing up so that I



(Testimony of Willie Henry Townsend.)

can exonerate myself? Mr. Lindley will tell you that he said there will be no employment for me due to rumor. I was working this last week at Antioch, and I was let go this week." I said, "Now then, I have got busted out; I ain't got no job; I am a long ways from home; I would like to [43] get squared up. If you can give me any assistance—" He says, "Them fellows are too busy; I ain't got time to talk to you." I says, "Sometime later?" "I will be glad to talk to the men," he said, "and maybe we can get together sometime later." I said, "OK." That was approximately the conversation.

Q. Did you discuss with him about going to work in the recovery department?

A. Not that day.

Q. He just told you that Lindley had no authority to fire you?

A. He told me Mr. Lindley—he said he didn't have that much authority.

Q. Did you tell him to put you to work?

A. I told him I wanted to work somewhere; he said he was busy; he didn't have time to take the case up now, but later. I said, "OK; see you later."

Q. What further happened?

A. Next time I saw Mr. Stitt on a Sunday on or about—it must have been about the 11th of September on a Sunday. But in the meantime I had gotten me a job with the Southern Pacific Railroad as master mechanic to come to Roseville Monday morning. So before I left I went up to Mr. Stitt's



(Testimony of Willie Henry Townsend.)

home on Sunday afternoon about one o'clock in his living room, and we discussed my history, you might say, in the pulp field and different things, and I left them that afternoon at five minutes to [44] four and caught the bus and went to Roseville, went to work for the Southern Pacific Railroad. The master mechanic sent me down to Sacramento in a month and a half and I worked as a boilermaker's helper in the roundhouse.

Q. Before we go into that phase of it, you say you saw Mr. Stitt?

A. I saw him on the 11th, Sunday, the 11th of September.

Q. What was that conversation?

A. I was just trying—general discussion where he had time to talk to me. On Saturday the third he didn't have time, so I went to his home.

Q. Did you discuss with him whether you were going to go to work at the recovery plant?

A. I discussed whether I was going to work in the pulp mill; I was assigned as a recovery operator because all my experience in the pulp industry was in that department and I had been told on the 15th of November, 1948, that that would be my assignment.

Q. Mr. Lindley told you that?

A. Yes, that's right. [45]

\* \* \*

The Clerk: Plaintiff's Exhibit 5 in evidence.

The Court: It will be admitted as Plaintiff's Exhibit No. 5. Do you make an objection, counsel?

(Testimony of Willie Henry Townsend.)

Mr. Holmes: Yes, on materiality.

The Court: I will overrule the objection.

(The letter referred to was thereupon marked Plaintiff's [47] Exhibit No. 5.)

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PLAINTIFF'S EXHIBIT No. 5

February 1, 1944

To Whom it may concern:

This will introduce to you W. H. Townsend, who has been continuously in the employ of The North Carolina Pulp Company for the past six and one-half years.

During construction Mr. Townsend acted as Foreman in the erection of power and recovery units; later assuming the duties of Recovery Plant Foreman and operating boilers using oil, coal and concentrated sulphate liquors as fuel.

During the past three years Mr. Townsend has served as Tour Foreman or General Foreman throughout the plant.

Throughout his period of employment with our Company Mr. Townsend has proved himself to be an efficient supervisor as well as a reliable, competent workman.

Yours truly,

S. M. RASMUSON,

Pulp Mill Supt., North

Carolina Pulp Company.

/s/ S. M. RASMUSON.

SMR/km

[Endorsed]: Filed October 11, 1950.

(Testimony of Willie Henry Townsend.)

Q. (By Mr. Garry): Mr. Townsend, at the noon recess I believe you testified that on your way to work on this railroad job that you had stopped to see Mr. Stitt at his home on a Sunday afternoon?

A. Yes, sir.

Q. On September 11, 1949? A. Yes, sir.

Q. I'm not sure you covered the conversation, but will you cover the conversation that is germane and pertinent to the lawsuit at hand?

A. Well, my reason for seeing Mr. Stitt that day was trying to clear up the records about my being a troublemaker or anything else. I told Mr. Stitt—I tried to be honest and tell him the truth; I had some stuff there—that recommendation, for one thing—and went over my history in the pulp industry and told him that I hoped sometime in the future that my case would be cleared up where I could come back to work, and I told him I was going to work for the S.P.; I had worked for the Southern Pacific before, I had a good record with them. And it was just a general discussion about my character and conduct and different places I had worked at and the type of work that I had did. It was mostly that. Mr. Stitt promised me that he would investigate my case, which he did, and later on I talked with him again on a trip home. I used to come in every week end [48] from Sacramento; I worked a five-day week. I think it was on about the 13th of October that I had a talk with Mr. Stitt, and he told me that as far as he was concerned my application for employment was active at the San



(Testimony of Willie Henry Townsend.)

Joaquin Division; that Mr. Lindley did not have the authority to tell me I couldn't work there and if I would contact Mr. McCuish. I called Mr. McCuish on the telephone.

Q. Just a minute, so that we will be able to follow this. You say this was on October 13?

A. On or about October 13, yes, sir, that I called Mr. McCuish.

Q. You talked with him after you talked with Mr. Stitt?

A. The next night, yes, I called Mr. McCuish after I had talked to Mr. Stitt.

Q. Where did you speak to Mr. Stitt?

A. In Antioch.

Q. Where?

A. At the mill, at the San Joaquin mill.

Q. By telephone? A. No, in person.

Q. Did you go to his office?

A. I went to his office.

Q. You spoke to him there? A. Yes, sir.

Q. What time of the day was that?

A. It was afternoon, around between two and three o'clock. [49]

Q. So you spoke to him, and what did he say to you?

A. He told me that as far as he was concerned, I was active; Mr. McCuish was up in Oregon, and he said as soon as Mr. McCuish came back from a convention of some kind, he would speak to him. And then I think it was on about the same day that I called Mr. McCuish from the Travelers Hotel



(Testimony of Willie Henry Townsend.)

on the telephone and told Mr. McCuish that Mr. Stitt said that I was eligible for work there; that I had had a talk with him, and I told Mr. Stitt all I wanted was just like they promised me, was a job, you know; I had my family out here and I liked Antioch, I liked California, I would like to stay there. So I told Mr. Stitt I was making \$1.42 and .6 an hour in Sacramento, but by the time I paid my expenses up there, my house rent and all in Antioch, I was actually making \$25 a week. So I told Mr. McCuish, and Mr. McCuish said that Mr. Stitt had told him that I was active; he said he didn't have any openings at the present time.

Q. But you spoke to Mr. Stitt in person in the afternoon? A. Yes.

Q. And he told you as far as he was concerned your employment was active?

A. That's right.

Q. He told you to talk to Mr. McCuish on a Sunday?

A. He said he would talk to Mr. McCuish.

Q. Did you ever talk to Mr. McCuish [50] yourself?

A. On the telephone from Sacramento, a few days later I called Mr. McCuish on the phone.

Q. Where was Mr. McCuish?

A. He was at his office at the mill, 1140 Antioch.

Q. In other words, several days after October 13th—you don't recall the date——

A. I don't recall the date.

Q. You spoke to Mr. McCuish regarding the

(Testimony of Willie Henry Townsend.)

conversation that you had had with Mr. Stitt on the 13th day of October, 1949; is that right?

A. Yes, sir.

Q. What was the conversation that you had?

A. Well, Mr. McCuish told me yes, that Mr. Stitt had saw him, but he said, "We don't have anything open right now, Townsend." He says, "I will keep you in mind." I said, "Thank you, sir."

Q. Was this after the recovery plant had opened?

A. It was along about the time that it was opening up. I was working in Sacramento. As I say, I don't recall the exact date, but the telephone record at the Travelers Hotel may give you the exact date.

Q. It was on the 14th, according to the answer of the defendants, that the recovery plant opened.

A. Well, I was working for the Southern Pacific at that time.

Q. It was a few days after that that you talked to Mr. McCuish? [51]

A. McCuish.

Q. He told you you were on the active list?

A. That's right.

Q. And that they didn't have anything open for you right now?

A. That's right.

Q. Did you ever have any further conversation or any communications with him?

A. No, sir. Oh, yes, every now and then I would see him when I could come on weekends; I always

(Testimony of Willie Henry Townsend.)

spoke; we have always been good friends; there ain't nobody fell out.

Q. Did you ever write to him?

A. Yes, I wrote Mr. Stitt a letter, and I also wrote the Antioch Division a letter, and I think that was around November; I don't remember the exact date—the 2nd of November or something like that.

Q. I show you here a letter dated November 2nd; is that a copy of the letter that you sent to Mr. Stitt?

A. Yes, sir, that is a copy of the letter that I sent.

\* \* \*

PLAINTIFF'S EXHIBIT No. 6

Sacramento, California

November 2, 1949

Mr. Claude Stitt, Manager  
Fibreboard Products, Inc.  
San Joaquin Division  
Antioch, California

Dear Sir:

In regards to letters I received from Fibreboard Products, Inc. in September and October, 1948, offering me employment in new pulp mill and employment in one of the company's other plants until such time as pulp mill began operation, I now request that I be given employment as promised or reason why I am not given employment.

(Testimony of Willie Henry Townsend.)

Hoping that we can reach a peaceful settlement in my case and avoid court procedure and anticipating an early reply, I beg to remain,

Respectfully yours,

W. H. TOWNSEND,  
511 Third Street,  
Antioch, California.

[Endorsed]: Filed October 11, 1950.

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The Clerk: Plaintiff's Exhibit 6 in [52] evidence.

\* \* \*

Q. Did you receive a reply from Mr. Stitt?

A. Yes, sir.

Q. In reply to that letter (handing paper to witness)? [53]

\* \* \*

The Clerk: Plaintiff's Exhibit No. 7 in evidence.



PLAINTIFF'S EXHIBIT No. 7

Fibreboard Products Inc.  
San Francisco

November 3, 1949

San Joaquin Division  
P. O. Box CC  
Antioch, California  
Mr. W. H. Townsend,  
511 Third Street,  
Antioch, California.

Subject: Inquiry as to Employment

Dear Mr. Townsend:

Relative to your letter of November 2nd, our records show that you were offered employment at the San Joaquin Division on Wednesday, August 31, 1949, and that you saw fit to turn down the position offered.

Yours very truly,

FIBREBOARD PRODUCTS INC.  
San Joaquin Division

/s/ C. M. STITT

C. M. Stitt

Plant Manager

CMS:ZR

[Endorsed]: Filed October 11, 1950.

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Q. What if anything did you do when you received that letter from Mr. Stitt?

(Testimony of Willie Henry Townsend.)

A. After I received that letter from Mr. Stitt I came back to Antioch and I was told Mr. King, public relations officer, would meet with me on the 16th of November at the old Antioch mill to take my case up. And on the 16th of November I [54] met with Mr. Clyde King, public relations manager for Fibreboard Products Inc., and Mr. Van Voorhis back there, and the new manager at that time was at the Antioch mill and he also sat in on the case. It was after the 16th of November meeting that Mr. King told me to give him a couple of weeks, he would study the case and see what he would be able to do with it. So it was along in December that I was notified that they would take no further action, and that is when I went to see Mr. Curtwright, an attorney in Sacramento.

Q. And filed this suit? A. Yes, sir, I did.

Q. Since October 14, 1949, have you been employed at all?

A. Well, I was—I was working with the Southern Pacific Railroad on October 14, 1949, and I was laid off on February 7th when they cut reduction of forces at the roundhouse at Sacramento, and I was unemployed from February 7th, 1950, until August 8th, 1950. I didn't have any job of any kind other than I would—I lived next door to a funeral home, and if I would go with the ambulance or hearse and to pick up a body, I would make one dollar.

Q. You mean if you picked up a stiff you would get a dollar for picking it up? A. Yes.

(Testimony of Willie Henry Townsend.)

Q. How many of those have you picked up?

A. Three or four a month; I wouldn't always be lucky enough [55] to make the dollar. Sometimes when his nephew would be there he would go out and save that dollar, and I would have to wait until the nephew was away.

Q. How much did you earn at the Southern Pacific?

A. \$1.42 6/10ths, 40 hours a week.

Q. How much money have you received, do you know, since October 14, 1949?

A. We was paid twice a month; I got \$108 one time, and \$116 another; it ran from \$108—\$224 a month.

Q. How much did that amount to?

A. I worked with them five months—a little better; I made \$1,275.

Q. \$1,275? A. Yes.

Q. From the Southern Pacific, is that right?

A. I have got the exact amount right here in my pocket. Can you see that, Judge, on the bottom there?

\* \* \*

The Court: This has a figure \$1,225.75.

The Witness: That is what I made during my service with the S. P. Sacramento division; that is railroad retirement pay. [56]

\* \* \*

Q. What have you been doing since August?

A. Working at a service station for Mr. Bill Sullivan on Sixth and "B" Street.

(Testimony of Willie Henry Townsend.)

Q. What do earn there?

A. I get \$55 a week and work 60 hours a week.

Q. What is that—about ninety cents an hour?

A. Probably a little better than ninety cents.

Q. Say ninety-five?                      A. Yes, sir.

Q. How much have you earned since you have been there?

A. Well, I have worked regular since August 8th.

Q. And how much have you earned?

A. About \$420; it has been two months.

Mr. Holmes: That is a matter of mathematics, I think.

Q. (By Mr. Garry): Have you ever had a chance to talk to Mr. Stitt since your letter of November 2nd?

A. Oh, yes, I have talked to Mr. Stitt on several occasions, both he and also talked with Mr. Lindley.

Q. On the 3rd of September, 1949, when you saw Mr. Stitt, you testified this morning that he said that Lindley had no business firing you?

A. That's right. [59]

\* \* \*

Q. When he told you he had no authority to fire you—is that correct?                      A. Yes, sir.

Q. Did you tell him that you had received a letter stating that you had refused a job on August 31, 1949?

A. I told him—told Mr. Stitt on the 3rd of September that I didn't refuse no job; I said Mr. Bob Fuller told me he had a job as broke baler, I could



(Testimony of Willie Henry Townsend.)

have it; that as soon as I told him Mr. Lindley had told me previous to that time there would be no employment coming he said there was a misconception; he said, "Under them conditions I will get somebody for the job." He says, "They told me you didn't have any job." I says, "I am working for Mr. Van Voorhis and Mr. Walcott making \$1.54 an hour. As far as I know, I can continue on."

Q. Did you talk that way to Mr. Stitt?

A. Yes. [60]

Q. On September 3rd? A. Yes, sir.

Q. You received a letter on November 3rd from Mr. Stitt pointing out to you, in response to your letter of November 2nd, "Our records show that you were offered employment at the San Joaquin Division on Wednesday, August 31, 1949, and that you saw fit to turn down the position offered." Did you talk to Mr. Stitt and tell him what they had offered? A. Yes, sir.

Q. What did you tell him?

A. I told him that Mr. Walcott told me on a Wednesday to report to Mr. McCuish's office at five minutes to one.

Q. Now you are not following me, Mr. Townsend. A. I am sorry.

Q. When you received that letter of November 3 from Mr. Stitt telling you that you had turned down a job on August 31st, did you ever talk to Mr. Stitt after that? A. Yes, sir.

Q. What did you tell him?

A. Well, I didn't go into the details about the

(Testimony of Willie Henry Townsend.)

answer to that letter, because I had already told him on the 3rd day of September that that wasn't so and asked him to bring Mr. Fuller and Mr. Lindley in from the plant into his office, and he refused to do so.

Q. On the 3rd day of September? [61]

A. That is correct.

Q. He refused to do that?

A. That is right.

Q. Then have you actually talked to him since November 3rd?

A. Yes, I have talked to him on several occasions, but I never mentioned that particular part of the situation. I have talked to him about getting an exoneration and going to work in a recovery department like I was promised. But Mr. Stitt since that time isn't manager now; he is in the engineering department out of the San Joaquin Division, and my case has been, you might say, in status quo since Mr.—

Q. Who was it that told you that? Who was it that referred this matter to Mr. King?

A. Well, I had one—when I was first discharged at the Antioch mill I called Mr. King. I tried to take up after I talked to Mr. Stitt and he wouldn't do anything. I tried to take it up with him trying to settle it in an amicable way and win an exoneration for myself, because I had been accused. They said I was being let out due to rumors, and I was making an honest effort to find out what the rumors

(Testimony of Willie Henry Townsend.)

were, because I have always tried to treat other people like I would be treated myself.

Q. Who told you you were being let out for rumors?      A. Mr. Lindley.

Q. When did he tell you that? [62]

\* \* \*

A. It was Sunday, August 28th.

Q. Sunday, August 28th?

A. At the same time he also asked me why I wrote a banker in Plymouth. And I said, "Mr. Lindley, I wrote that banker because you told me over the telephone that you were hearing a lot of stories about me, and I was just writing that banker in Plymouth, North Carolina, to let Mr. Stitt and you know what my character was the nine years I lived in Plymouth, North Carolina, both myself and my family."

Q. Mr. Stitt never told you that they didn't want you because of any——      A. He never——

Q. Just wait until I finish my question, Mr. Townsend. Mr. Stitt never told you that they were letting you out, didn't want you, because of rumors?

A. No, sir. [63]

Q. Mr. Stitt never told you at any time that they didn't want you, except this communication you received on November 3?      A. That is right.

\* \* \*



(Testimony of Willie Henry Townsend.)

Cross-Examination

By Mr. Holmes:

Q. Mr. Townsend, you worked for a pulp mill from about 1928 to 1935, didn't you?

A. Yes, sir.

Q. What was that mill?

A. Gulf States Paper Company, Tuscaloosa, Alabama.

Q. Then there was some difficulty at the time you left, was there not, some dispute between you and your employer?

A. No, sir, not between me and my employer, no, sir.

Q. You left there?

A. A man told me to kiss his ass, and I knocked him down. Where I come from, they don't kiss asses.

Q. You left the job hurriedly? [64]

A. No, sir, I didn't leave the job in a hurry. I stayed there and finished out my shift, then I quit.

Q. You had had some fight on the job with that man?

A. There was no fight, I just knocked the man down. He never did get up or there would have been a fight. It takes two people to fight; there wasn't but one.

Q. Then for a couple of years you drove taxicabs, didn't you?      A. That's right.

Q. Before you went into a pulp mill again?



(Testimony of Willie Henry Townsend.)

A. I went with the North Carolina Pulp in 1937.

Q. You drove taxicabs for a couple of years, though, did you?      A. Yes.

Q. Between the two pulp mill jobs, is that right?

A. I drove taxicabs and worked on the river, yes.

Q. Then you went to work for the North Carolina Pulp and Paper Company from about June, 1937, until about——      A. April 14——

Q. April, 1945?      A. April, 14, 1945.

Q. And then there was some difficulty between you and your employer at that time and you left; isn't that true?

A. I organized the salaried foremen, and I was called in and told that my services was ended.

Q. There was some little dispute between you and your employer and then you left? [65]

A. I was let out for organizing the salaried foremen, the first group of salaried foremen ever organized in the paper industry.

Q. Then from April, 1945, on you didn't work in a pulp mill any more at all?

A. I worked almost two years of that time as field representative of the pulp and paper mill union.

Q. You worked for two or three unions in that period, didn't you?

A. Yes, sir, but they was all representing the paper industry.

(Testimony of Willie Henry Townsend.)

Q. Then you worked for a couple of railroads, didn't you?

A. Burlington and Southern Pacific.

Q. And you also drove cab for a while during that period, didn't you?      A. That's right.

Q. And you had eight or ten jobs between 1945 and 1948, didn't you?

A. I about six, yes, sir.

Q. You had two railroad jobs, three union jobs—that is five—and how many cab jobs did you have?      A. One.

Q. Did you have any other jobs during that period?      A. Otis Elevator.

Q. Otis Elevator?

A. Bagbee Elevator and Electric. [66]

Q. Bagbee Elevator and Electric. That makes seven or eight jobs, is that right, during that period?

A. That is right.

Q. And you had not been in a pulp mill as a worker since the early spring of 1945, is that true?

A. Since 1940 as a worker; I was foreman from 1940 to 1945.

Q. You had been there as a foreman up to April 14, 1945?      A. That is right.

Q. After that you weren't in a pulp mill at all working?      A. No, sir.

Q. Then you got a job with this elevator company in the month of August, 1948?

A. That's right; I quit Bagbee and went over to it.

(Testimony of Willie Henry Townsend.)

Q. And that was to help install about three elevators, wasn't it?

A. Well, I helped install three elevators with them.

Q. Yes; but you were employed——

A. If I hadn't come off there, I would probably still be helping them; maybe I may have been suspended.

Q. What were the terms of your employment with Otis Elevator?

A. \$1.58½ an hour and full time for all overtime.

Q. Was there any guaranty as to how long you would work?

A. The man I was working with had been with them eight years, and he said I could work with him right along.

Q. He, however, came from another state? [67]

A. He was from North Carolina.

Q. He came to install three elevators?

A. He goes all over.

Q. He was sent down to install an elevator at the university and one at the hospital?

A. Two at the hospital, and at the president's home at the University of Alabama.

Q. That job was just about completed when you left Alabama, wasn't it?

A. Yes, sir, but he went on another one.

Q. In Tuscaloosa?

A. No, sir, I think the next one was in North Carolina.

(Testimony of Willie Henry Townsend.)

Q. Then the job at Tuscaloosa, Alabama, was just about up, wasn't it?      A. That's right.

Q. In addition to these other letters which you have identified that were written in 1948 you wrote this letter of September 7th, didn't you?

A. That's right; I wrote that from Tuscaloosa, Alabama.

Q. And you filled out an application blank and sent it with this letter?      A. Yes, sir.

Q. Is this the application blank (showing)?

A. That's right, that's right. [68]

\* \* \*

The Clerk: Defendant's Exhibit A in evidence.

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#### DEFENDANT'S EXHIBIT A

Tuscaloosa, Ala.

Sept. 7, 1948

Mr. C. M. Stitt,  
Plant Manager,  
Fibreboard Products, Inc.,  
Antioch, Cal.

Dear Sir:

Have just rec'd your letter of Sept. 1st with application blank. Appreciate your letter very much and hope to have the pleasure of meeting personally with both you and Mr. T. Lindley, your pulp mill supt., in the near future. Saying again to you both that I will appreciate any job you people have to offer me and assure you that you will have a steady worker and one that will be with you for many years



(Testimony of Willie Henry Townsend.)

to come. Will close with best regards and hoping to hear from you people again in the near future. I can report for work on one week's notice.

Yours truly,

W. H. TOWNSEND,  
Apt. 23A Druid Gardens,  
Tuscaloosa, Ala.

Received September 10, 1948.

[Endorsed]: Filed October 11, 1950.

---

Q. (By Mr. Holmes): This is your signature on this application blank, isn't it?

A. Yes, sir.

Mr. Holmes: I will offer next the application blank [69] dated September 7, 1948, signed W. H. Townsend.

Q. With respect to this application blank, Mr. Townsend, there is a line that asks "Were you ever asked to resign?" And the word "No" written in there. Did you write that in there?

A. I was never asked to resign.

Q. Did you write in the word "No"?

A. That is right.

\* \* \*

Q. (By Mr. Holmes): On the reverse side of this application blank under "Previous employments" it lists some of your previous employers, does it not? A. That's right.

(Testimony of Willie Henry Townsend.)

Q. Those are some of the employers that you have already mentioned in your testimony, is that right?      A. Yes, sir.

Mr. Holmes: I will offer this application blank. There are some matters on it which I think Mr. Townsend didn't put on. For instance, the shorthand at the top of the page; you didn't put that on? [70]      A. No, sir; I can't write shorthand.

Q. And the red mark under "Recovery room"?

A. No.

Q. And the matters in pencil on the reverse side which have been crossed out; you didn't write those on, did you?      A. No, sir, I didn't.

\* \* \*

The Clerk: Defendant's exhibit B in evidence.

EMPLOYMENT DEPARTMENT

FIBREBOARD PRODUCTS INC.

No 24449 Application Blank

Exhibit No. 8

SEP 11 1948

Filed OCT 1 1950

C. W. Calbreath, Clerk

C. M. S.

By Louis W. McDonald  
Deputy Clerk

Approved by  
Division  
Emp. begins  
Department  
Position

Date Sept, 7 - 1948

Full Name Willie Hugh Townsend Telephone Number

Social Security No. 422-03-9553

Address: Street and No. apt. 23A Druid Gardens City and State Tuscaloosa, Ala.

Where were you born? Tuscaloosa Ala. Date of birth: July 7 - 1900

Age 48 Sex male Nationality American Height: 5ft 8-0 Weight: 155

Kind of work desired Pulp mill foreman How much experience have you had in this work? Five years

What other lines of work does your experience include? 12 years as Recovery Room Foreman and Recovery Boiler operator

Are you married or single? Married Divorced? Widow? Widower?

How many depend on you for support? Four What salary would you be willing to accept? Co. Rate of Pay for any

State number of children, if any, and ages: Three daughters ages 15-17-19 years

Do you live with your parents? Relatives? Keep house? yes Board? Self-supporting?

Were you ever asked to resign? no If so, for what cause?

Are you employed at present? yes Employer's name and address Otis Elevator Co. N.Y. City N.Y.

Present salary? \$143 per wk Why do you wish to change? Wish to Return to Kraft Pulp mill

Why do you desire to work for the Fibreboard Products Inc.? having helped in the construction

and Starting Productions in two Kraft Pulp mills & Believe I would

get a nice opportunity with you people in your new mill also like South of

if you have previously been employed by the Fibreboard Products Inc., or its subsidiaries, give dates and position held

How far did you go through school? Eighth Grade Date of leaving school May 1944

Give name and locations of schools or colleges from which you graduated Stafford School

Tuscaloosa Ala

What educational courses are you now taking, if any?

Applicant's signature W. H. Townsend

(OVER)





PREVIOUS EMPLOYMENT

Month	Year	Name of Employer	In what Department did you work	What position did you hold	Why did you leave	Salary
From June 6	1928	Gulf States Paper Co.	Recovering Dept	Emp't. operator & Rec. operator	to seek better job	50¢
To July 15	1936	Tuscaloosa Ala	Under whom Mr Joe Richardson	Gen. Supt		35¢
From Aug 29 <sup>th</sup>	1937	N.C. Pulp Co	Recovery & Pulp mill General	Recovering Supt		
To Oct 14	1945	Plymouth N.C	Under whom Mr S. M. Rasmussen	Supt.	for R.R. job	35¢
From Nov 13	1945	Burlington R. R	Transportation	Locomotive Fireman	Due to living conditions for family	mil app. 4.00
To Sept 30	1945	Lincoln Neb.	S.E. Pandrie		for job in Mexico	250 + 4¢
From May 1 <sup>st</sup>	1946	Pulp Sulphite & Paper mill	Under whom	Field Rep.		
To Oct 11	1947	St. Edward. N.Y	Under whom Mr John P. Burke			

References—Do not give relatives or former employers

Include anyone you know who is employed by Fibreboard Products Inc.

Name	Occupation	Street Address	City and State
Mr Luther Davis	President of City Commission		Tuscaloosa Ala
Mr H.E. Beam	Bank Cashier	Branch Bank & Trust Co	Plymouth N.C
Mr Chester Walker	Probate Judge		Tuscaloosa Ala
Mr Archie Spain	Engineer, Southern Pacific R.R		Gila Bend Arizona

Remarks:—(This space reserved for Employment Manager)

Rec'd and Sept 10, 1948.  
[Endorsed]: Filed October 11, 1948.



(Testimony of Willie Henry Townsend.)

Q. (By Mr. Holmes): At the time you talked to Mr. Lindley in your first telephone conversation when you called him from Tuscaloosa, Alabama, on Tuesday, October 18th, was there anything said about the length of time you would be employed?

A. Yes, sir.

Q. What was said?

A. I wanted to know if I could depend on it to be a permanent job.

Q. And what did he say?

A. He said yes. [71]

Q. Now, at the time this action was filed you verified a complaint, didn't you? I show you a copy of the first complaint that was filed in this case; it indicates that it was sworn to by you; isn't that right?

A. Yes, sir.

Q. And in the third paragraph of that complaint—

Mr. Garry: Just a minute, counsel. What are you referring to now?

Mr. Holmes: The third paragraph of the original complaint, on lines 11 and 12: "that the defendant should employ this plaintiff as such recovery operator for an indefinite time"—lines 11 and 12.

A. There was nothing said about recovery operator until the 15th of November when I arrived at the San Joaquin plant.

\* \* \*

The Court: Counsel has a right to conduct [72]

(Testimony of Willie Henry Townsend.)

his cross-examination. The thing counsel wants to know if you verified that complaint.

A. I verified the complaint, yes, sir, but——

The Court: That is argument, Mr. Townsend, and your counsel is competent to make it.

Q. (By Mr. Holmes): When did Mr. Lindley say anything to you about the job as recovery operator? A. On the 15th of November.

Q. He didn't say anything about the recovery operator's job in your telephone conversation?

A. No, sir; he told me Mr. Stitt had given him my recommendation from the North Carolina Pulp Company and my application for employment and it seemed I was an experienced Kraft pulp mill man.

Q. He didn't promise you any particular job at all? A. That's right.

Q. You didn't know what it would be?

A. Presumably it would be a tour foreman's job. That was the last job I had.

Q. Which was what you applied for?

A. Yes, sir.

Q. That is what you wanted?

A. That is what I wanted.

Q. He didn't promise you that or any other job on October 18th? [73]

A. No, sir; he just told me if I would come down they would place me in one of the other mills until such time, and that I could work in that until it was open, and I could stay here and the com-



(Testimony of Willie Henry Townsend.)

pany would help me buy a home if I wasn't able to buy one.

Q. After that you did come out and did take a temporary job in that other mill?

A. Yes, on his promise, he told me——

Q. You did work temporarily in the other mill, and you understood that you would be employed there until a place was found for you in the San Joaquin Division; is that your understanding?

A. Yes.

Q. Then when a position was offered you in the San Joaquin Division you turned it down because you said you already had a position?

A. There has been no position offered at the San Joaquin other than as I have said, Mr. Bob says, "I have got a job on the broke baler." I said, "Mr. Bob, I am working for Mr. Van Voorhis and Mr. Wolcott for \$1.54." He says, "They told me you wasn't working at all." Mr. Bob Fuller withdrew the offer as soon as I told him the truth about it.

Q. Now, in the first amended complaint, paragraph 3 on lines 13 and 14, it reads:

"that the defendants should employ this plaintiff as such recovery operator for so long as plaintiff [74] should be desired to be so employed and for so long as plaintiff's work should be satisfactory."

A. That's right.

Q. Did you understand that to be the terms of your employment?

(Testimony of Willie Henry Townsend.)

A. Well, that is, most companies have that policy, as long as a man's work is satisfactory his employment continues, and when a worker's work gets unsatisfactory, they are generally called in on the carpet and either laid off or reprimanded.

Q. But the other part of it, that you could work as long as you desired to be employed; is that your understanding of the contract also?

A. Well, I was told that I would have a recovery operator's job, and I knew if I went to work as a recovery operator I had to produce in order to remain on the job. [75]

\* \* \*

The Court: Would you read it again?

(The reporter read the question.)

A. Yes, sir.

The Court: Now, if you have any explanation you want to make to that, go ahead.

A. Well, when I say "Yes, sir" I figured I would work—I never missed a day's work in my experience in the pulp mill. My record with the other people would show I was on the job with the Gulf States Paper Company from 1928 to 1936 and from June, 1937, to April, 1945, with the North Carolina Pulp Company, and never missed one day. I told Mr. Stitt in my application for employment out here that I had a wife and three daughters; I was seeking permanent employment. I told Mr. Lindley when I talked with him on the 18th of October that I appreciated hearing from Mr.

(Testimony of Willie Henry Townsend.)

Stitt, and I would appreciate very much coming to California to work with those people; that Mr. Stitt had told me that he would be on the job; however, before making actual commitments. He said, "Mr. Stitt, give me the application." He said, "I got your copy of recommendation from the North Carolina Pulp Company." He said, "You seem like you are capable or like you are the kind of man we are looking for. We can put you on temporarily in one of our other plants until the pulp mill is open. We expect to be going some time around—— [76]

Q. When was this said to you?

A. That was in the telephone conversation the 18th of October.

Q. But you understood that you could quit the job any time you wanted to?

A. Well, in America we can all do that, yes, sir.

Q. You weren't bound for any particular length of time, were you?

A. No, sir, I never did go to work out there.

Q. I am talking about your understanding of the contract you had. You understood, Mr. Townsend, if you went to work pursuant to this what you believed to be a contract, you could quit any time you wanted; isn't that true?

A. That is true.

Q. And you weren't bound to work for any particular length of time even if you did take the work; isn't that right?

A. That is true, yes.



(Testimony of Willie Henry Townsend.)

Q. When was the first time you talked to anybody about transportation money?

A. The 14th of August, 1949.

Q. You didn't talk to anybody about it before that? A. No, sir.

Q. The subject hadn't been mentioned before that?

A. Nothing, only on the telephone conversation Mr. Lindley [77] asked me if I had enough money to get out here, I told him yes, sir. He said it would be refunded.

Q. Between that instance and October 14th there was never any mention of it, is that right?

A. Never mentioned, no, sir.

Q. The only person you talked to then after you came to California was Mr. Stitt, with respect to this subject? A. That is correct.

Q. Is that right? A. Yes.

Q. And in the course of your telephone conversation with Mr. Lindley you say he mentioned that he had your application? A. Yes, sir.

Q. Did he mention any of the references on that application? A. No, sir.

Q. Do you remember him telling you that the company investigated people before it hired them?

A. No, sir.

Q. Do you remember him telling you that he had many applications and that he would, in the course of his work, investigate you and the others also?

A. No, sir.

Q. And do you remember him telling you that



(Testimony of Willie Henry Townsend.)

he had to choose the men for his crew on the basis of their qualifications?      A. No, sir. [78]

Q. Do you remember him telling you that he would determine the qualifications of men by their work history or by recommendations or by investigation through previous employers?

A. He said that the recommendation that he had there seemed to show that I was a capable Kraft pulp mill man. He made that remark.

Q. Did he say anything about investigating with other employers?      A. No, sir.

Q. You don't remember anything of that sort at all?      A. No, sir.

Q. Is that right?      A. No, sir.

Q. Why did you tell him you were going to arrive on the 15th of November?

A. Because I had quit my job on the 7th; I had told Mr. Utley the 7th would be my last day, and I figured arriving there on the 14th of November. I was going to leave the 8th or 9th.

Q. You had made those arrangements before you talked to Mr. Lindley, is that right?

A. I made those arrangements after the telephone conversation with Mr. Lindley, I quit my job.

Q. Just a minute; I don't think you understood the question. You testified that you told Mr. Lindley that you would be in California on the 15th of November. [79]      A. That's right, yes.

Q. Why did you tell him you would get there on that day?

A. Because I was going to work out a notice.

(Testimony of Willie Henry Townsend.)

Q. You were just going to leave a job, is that right?

A. No, I wasn't going to leave the man without another man to help him.

Q. You weren't going to come until you got someone to replace you?

A. That was approximately from the 18th of October to the 15th of November.

Q. But you left——

A. The 9th of November I left Tuscaloosa, Alabama at 6:45.

Q. I want to know what the significance was of your telling him you would be here on November 15th.

A. Knowing that that is the last day of the first half of the month, if they pay off then, if I was there on the 15th and went to work I would get in half a month's pay with Fibreboard in the month of November, 1948.

Q. That was the only reason you told him you would be there on the 15th?

A. That was the only reason, with the exception when you are moving to a new place, if a man gets there he has got to find a suitable place for his family to live; you must have a chance to pick out a home and a place to stay; you try to get about eight hours' sleep so you can do eight hour's honest [80] work.

Q. Was this conversation you had with Mr. Lindley after you arrived in California—you had

(Testimony of Willie Henry Townsend.)

two conversations, didn't you, within a very short time?

A. I had a conversation on the 15th day of November.

Q. Then you talked to him again a day or two later, did you?

A. I talked with Mr.—I talked with Mr. McCuish. He is the man that told me to go down to the Antioch division of the Fibreboard and report to the personnel man, Mr. Boyd.

Q. That isn't answering my question. I want to know if you talked to Mr. Lindley twice right after you came to California.

A. Not that I know of; no, sir; I talked to him on the 15th of November.

Q. Did you talk to him just once in the first week or so that you were in California?

A. Yes, sir.

Q. Is that the conversation that took place there at the mill?      A. Yes, sir.

Q. In the course of that conversation do you recall Mr. Lindley telling you that he hadn't made any investigation of you?

A. No, sir, he didn't tell me that.

Q. Do you remember him telling you that they didn't hire people over the telephone? [81]

A. He didn't tell me that, no, sir.

Q. Do you remember him telling you that they had to interview people before they hired them?

A. No, sir.

Q. Do you remember him telling you that he

(Testimony of Willie Henry Townsend.)

intended to correspond with the references you had given to former employers?      A. No, sir.

Q. You don't recall him telling you that?

A. No, sir.

Q. Do you recall him telling you that the mill wouldn't be opened until the following March or later?

A. He didn't know when it would be opened.

Q. Did he tell you it would not be open before March?

A. He told me that he didn't know exactly when, but he would place me in the Antioch mill until such time as he could use me there.

Q. Do you remember him telling you that he was investigating other applicants for employment also?

A. No, sir, he didn't tell me that.

Q. You don't remember that at all?

A. No, sir. [82]

\* \* \*

Q. (By Mr. Holmes): Mr. Townsend, do you recall in your conversation with Mr. Stitt on or about the 3rd of September talking to him about the offer of a job by Mr. Fuller?

A. Yes, sir.

Q. Do you remember telling Mr. Stitt that you couldn't refuse a job because you already had one?

A. I told Mr. Stitt that Mr.—I says, "Mr. Fuller told me that he would give me a job as a male operator; but as soon as I told Mr. Bob Fuller that I was working at the old mill for \$1.54,



(Testimony of Willie Henry Townsend.)

he withdraw it." I asked Mr. Stitt to bring Mr. Fuller into his office to verify it, and he refused to bring Mr. Fuller in.

Q. Didn't you tell Mr. Stitt that you couldn't refuse a job because you already had one? Do you remember telling him that?

A. I told him that I told Mr. Fuller as I already said, and as soon as I told Mr. Taylor he withdrew the offer of the broke baler job operator. I told Mr. Stitt that, yes, sir.

Q. You talked to Mr. McCuish after you talked to Mr. Fuller, didn't you?      A. Yes, sir.

Q. On your way out of the plant?

A. Yes, sir. [83]

Q. About the 31st of August?      A. Yes, sir.

Q. Wednesday?      A. Yes, sir.

Q. Do you remember telling Mr. McCuish that Mr. Fuller had offered you a job but that you had told him that you couldn't take a job when you already had one that paid you more money?

A. No; I told Mr. McCuish the same thing that I told Mr. Claude Stitt the following Saturday.

Q. Just a moment. You don't recall telling Mr. McCuish the statement that I have just read to you?

A. No, sir.

Q. You don't recall making that statement?

A. Yes, sir; I told him that Mr. Fuller was going to hire Fisher for the broke baler job.

Q. You told him he was going to hire Fisher?

A. Yes, sir; he was coming out there to see him

(Testimony of Willie Henry Townsend.)

about hiring him. Mr. McCuish is the man that does the hiring.

Q. Didn't you ask Mr. McCuish to hire Mr. Fisher?

A. Yes, I asked him, and Mr. Lindley, too, on February 8th—I had asked Mr. Lindley to give him a chance for the job.

Q. Let's stick to this conversation with Mr. McCuish on or about the 31st of August. You asked Mr. McCuish to give Mr. Fisher that broke baler job, didn't you?

A. I told Mr. McCuish that Mr. Fuller said he was coming [84] out to ask him to put Mr. Fisher on at eleven o'clock that night.

\* \* \*

A. No, sir, I didn't tell him that.

Q. (By Mr. Holmes): Fisher was your brother-in-law? A. That is correct.

Q. Living with you?

A. He is my wife's oldest brother.

Q. And he was out of a job and he was living with you? A. That is correct.

Q. You were trying to get him a job?

A. Yes, sir, and had been since February 8th.

Q. When you refused this job with Mr. Fuller you tried to get Mr. Fisher the job, is that right?

A. No, I didn't refuse the job with Mr. Fuller.

Q. You didn't take the job, did you?

A. I wasn't offered the job. I was offered it and then was withdrawn as soon as I told him I

(Testimony of Willie Henry Townsend.)

was employed. That is the reason he was going to ask Mr. McCuish to give Fisher the job, because there was a vacancy there. [85]

Q. Immediately after discussing the matter with Fuller, you did ask Fuller to give Fisher the job?

A. That's right.

Q. Then you went out and told Mr. McCuish you wanted Fisher to have the job?

A. No, sir, I didn't tell him that.

Q. I believe you have identified a couple of letters that you wrote to Mr. Stitt and that Mr. Stitt wrote to you in the early part of November of 1949; is that right? A. Yes, sir.

Q. About that time you wrote letters to the Antioch division also, didn't you?

A. Yes, sir.

Q. I will show you a copy of a letter that purports to be addressed to Mr. William W. Van Voorhis, signed by yourself, and ask you if it is a copy of your letter? A. That is correct.

Q. You got a reply, didn't you, from Mr. Van Voorhis? A. Yes, sir.

Q. Is this the reply (showing)?

A. That is correct. [86]

\* \* \*

The Clerk: Defendant's exhibit C in evidence.

\* \* \*

The Clerk: Defendant's exhibit D in evidence.

\* \* \*

Q. (By Mr. Holmes): Mr. Townsend, do you

(Testimony of Willie Henry Townsend.)

remember in your conversation with Mr. Stitt at his home that you told him——

\* \* \*

The Witness: September 11th.

Q. (By Mr. Holmes): That is when you went and spent the whole afternoon before you went up to Sacramento? A. Yes, sir.

Q. You were there about three hours? [88]

A. From ten minutes past one until five until four.

Q. You talked to him for about three hours?

A. Yes, sir.

Q. Do you remember in the course of that conversation talking about this job offered by Fuller and telling Mr. Stitt "I was offered a job but I didn't refuse one"? Did you remember telling him that?

A. I told him the same thing that I told him on the third day of September. I told him that as soon as Mr. Fuller found out that I was not unemployed he withdrew the offer. So therefore I didn't have to refuse the job or I didn't have an opportunity to accept or refuse. The job was offered to me, and as soon as I told the truth he said, "There is a misconception." He says, "I will get somebody else for the job." This is when I mentioned Fisher's name.

Q. Do you remember telling Mr. Stitt that the reason you turned down the job with Fuller was that you were working at Antioch?



(Testimony of Willie Henry Townsend.)

A. No, sir.

Mr. Holmes: That is all.

Redirect Examination

By Mr. Garry:

Q. Mr. Townsend, Mr. Holmes asked you a question as to what you understood the contract conversation you had on the telephone on October 18, 1948, to mean. I believe you testified that there was a position he said that [89] you were promised; isn't that correct? A. That is correct.

Q. What position did you understand him to mean?

A. Well, from—I made application for a night superintendent's job, tour foreman's job; that is, shift foreman throughout the pulp mill.

Q. This application you talk about is the application that was introduced as Defendant's Exhibit B?

A. Yes.

Q. And I show you under date of September 7, 1948, that application; is that correct?

A. Yes, sir. It says, "Kind of work desired: Pulp mill tour foreman."

Q. And that is the position that you understood that you were being employed for, is that correct?

A. Yes, sir.

Mr. Holmes: That is objected to as calling for the subjective conclusion of this witness. [90]

\* \* \*

The Court: Well, as to what his understanding

(Testimony of Willie Henry Townsend.)

was, I agree with you; the objection is good. Sustained, in so far as what understanding he had over the telephone. What discussion they had is perfectly material.

Q. (By Mr. Garry): What understanding did you have as to the position that you were being offered over the telephone, Mr. Townsend?

A. He said my application was before him and that Mr. Stitt [91] had also given him a copy of this recommendation from the North Carolina Pulp Company, and that my reference of the North Carolina Pulp Company proved that I was a capable Kraft pulp mill man and that they were looking for eligible men, so that my application was accepted, and that they would place me in one of the other mills until such time as the pulp mill started. I had made application for pulp mill tour foreman's job, so that was the natural consideration in my mind that I was——

The Court: Just a moment; I am not interested in what you were thinking; I am interested in what was said.

A. He said my application was accepted, and my application was for a Kraft pulp millman.

The Court: That was when you were talking in the telephone conversation? A. Yes, sir.

Q. (By Mr. Garry): In that conversation did you ask him anything in reference to time——

A. I asked him about the housing situation. I asked him would the job be permanent. And he said yes, I could consider it to be a permanent job.

(Testimony of Willie Henry Townsend.)

I told him the reason why I wanted it was I wanted to bring my family with me when I came. And he said I could consider it to be a permanent job, and that if I wasn't able to buy a house the company would help me buy a house. [92]

Q. Now, Mr. Townsend, this job that we are talking about that Mr. Fuller told you about on August 31, 1949, where was this so-called job?

A. That was in the paper mill, different from the Kraft mill.

Q. Had you ever had any experience in print paper, working in a paper mill? A. No, sir.

Q. I didn't get that answer.

A. No, sir, I have never worked in a paper mill.

Q. What has been your service?

A. Always in a Kraft pulp mill. [93]

\* \* \*

### Recross-Examination

By Mr. Holmes:

Q. Mr. Townsend, you went over to the San [94] Joaquin plant to work there for a short time, didn't you, the last week in July and the first week in August in 1949?

A. I went there the 4th day of August and worked until the 14th day of August as a janitor and cleanup man.

Q. You worked on the broke baler during that period of time, did you?

A. I helped the man on the broke baler. I helped

(Testimony of Willie Henry Townsend.)

the broke baler operator drag the broke up from underneath the baler machine.

Q. Operating the broke baler was something which you had seen many times, wasn't it?

A. I had saw that done since 1928 but I never had did it.

Q. You hadn't done it until this period in August, is that right?      A. That is correct.

Q. Did you have any complaints about your work on that broke baler in August when you were there?

A. No, sir.

Q. You were competent to do that, weren't you?

A. Yes, sir.

Mr. Holmes: That is all.

Q. (By Mr. Garry): What were you getting paid when you were working at that?

A. \$1.42 and 1/2 cents. [95]

\* \* \*

### THOMAS M. LINDLEY

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court, please?

A. Thomas Marion Lindley. [97]

### Direct Examination

By Mr. Holmes:

Q. Do you reside at Antioch, California, Mr. Lindley?      A. Yes.

Q. You are employed by Fibreboard Products, Inc.?      A. Yes.



(Testimony of Thomas M. Lindley.)

Q. Were you employed by Fibreboard between the period of September, 1948, and September, 1949?

A. Yes.

Q. And in what capacity?

A. Superintendent of the pulp mill.

Q. What do you mean by the pulp mill?

A. The pulp mill is the part of a plant where the wood is brought in and cooked up into pulp for the making of paper.

Q. Is that one department of the plant?

A. That is one department.

Q. Are there other departments? A. Yes.

Q. What other departments?

A. Two other departments, the paper mill and what we term the wood room.

Q. Are they all in the same building?

A. The paper mill and the pulp mill are all in the same building and the wood mill is in a different structure.

Q. You are superintendent of the pulp mill, is that correct? [98] A. Yes.

Q. On or about the 18th of October, 1948, do remember having a conversation with Mr. Willie H. Townsend? A. Yes.

Q. Did he call you or did you call him?

A. He called the plant and asked to speak to me.

Q. And did you talk to him? A. Yes.

Q. Do you remember the conversation?

A. Yes.

Q. About how long did it take?

A. Possibly ten minutes.

(Testimony of Thomas M. Lindley.)

Q. Do you recall what Mr. Townsend said when he first spoke to you?      A. Yes.

Q. Would you repeat the conversation as nearly as you recall it?

A. As best I recall, Mr. Townsend informed me that he had 20 years, something like that, experience in the pulp industry; that he was out of work; had no work in sight and he was broke; his family were—he was in bad circumstances and had to have a job. He informed me that he could get out to California for just his gasoline expenses and he felt that he could do better out there than he could where he was staying; that in a new mill there was opportunities that there wasn't where he [99] was. His statements also included the time spent in the industry and a very brief description of his education and training, the types of equipment he had worked on.

Q. Was there mention of the fact that he had filed an application with the company?

A. He mentioned that he had filed an application with us and that he had a letter from Mr. Stitt acknowledging the application and that——

\* \* \*

Q. (By Mr. Holmes): Do you recall anything more that was said in this conversation by Mr. Townsend?

A. His experience, his background. On my statement to him at that time that the company had to examine all the records of every applicant——

Q. This is what you said to him in reply?

(Testimony of Thomas M. Lindley.)

A. Yes, this——

Q. All right; state what you said to him.

A. This conversation was two-sided to some extent. I stated [100] to him that we had to examine all the applications; we had to write to several of his—in fact, to all of his past employers; to the effect also that we had a physical examination that he would have to pass before he could be hired. Also I told him that the plant startup date was so far in the future that I couldn't encourage any—I asked him why he wanted to make the move at this time. Then he gave me the story about the hardship in his case; that he was out of work and had nothing in sight there.

Q. Did you tell him that you would give him a permanent job?      A. No, sir.

Q. Did you tell that you would refund any amount he spent in transporting himself and family from Alabama to California?      A. No.

Q. Did you tell him that the company would help him purchase a home?      A. No.

Q. Did you say anything to him concerning transportation money or transportation expenses?

A. No.

Q. Was the subject mentioned in the conversation?

A. He mentioned the subject briefly, as I said, regarding his being able to get out there in a car somehow or other; that it would only cost him his gas, and it would only require his [101] buying the gas.



(Testimony of Thomas M. Lindley.)

Q. My question is did you make any statement with respect to the company paying the transportation expenses?      A. No, never.

Q. Did the conversation concern any particular job in the plant?      A. No.

Q. Was there any discussion of any particular job in the plant?      A. No.

Q. Did Mr. Townsend tell you he would arrive ready for work on November 15th?

A. No, he didn't.

Q. Was there any mention made of a temporary job in another plant?

A. Yes, I stated to him that if he had to have work, provided his records stood up under our examination and so forth, that he could reasonably count on work in the new mill and that we would—in his case where he was out of work, we would try to place him in one of the other plants until we got ready for him at the new mill.

I also stated to Mr. Townsend that I had no authority to hire people over the telephone nor to make contracts. The only reason for this conversation was that in his case, as he stated, he was out of work and he had to have a job. [102]

Q. Was there anything else said in this conversation that you can recall?

A. At the moment I don't recall.

Q. When did you see or talk to Mr. Townsend after this telephone conversation?

A. The morning he arrived there I believe he



(Testimony of Thomas M. Lindley.)

came in the office and said "Hello" or something of that kind, and made it known that he was there.

Q. Do you know approximately when that was?

A. It was something around the middle of the month of November, I believe.

Q. Did you talk to him on that occasion?

A. Not about the job.

Q. You did see him then?

A. I seen him then.

Q. What did you talk about?

A. Well, he stated his intentions of driving this car to some fort, and locating his family in Los Angeles or somewhere where he had relatives and that he would be back in a few days.

Q. Anything else about that that you can recall?

A. I stated to him that we would set the machinery in motion to try to place him in one of the plants.

Q. Anything else in that conversation?

A. No, I don't believe so.

Q. When did you see or talk to Mr. Townsend again after that? [103]

A. Upon his return to the plant after taking his car where he was delivering it to, he returned, and I was notified by Mr. McCuish that he was there, and we had our interview.

Q. Who is Mr. McCuish?

A. He is our personnel manager.

Q. And Mr. McCuish notified you that Mr. Townsend was there?           A. Yes.

(Testimony of Thomas M. Lindley.)

Q. Then did you talk to Mr. Townsend on that occasion?      A. That's right.

Q. This was sometime in the month of November, 1948?      A. Yes.

Q. Where did the conversation take place?

A. In my office there in the plant.

Q. In the plant?      A. At the plant.

Q. Was anybody else present?

A. Yes, Mr. McCuish was there.

Q. All of the time or just part of the time?

A. He was there most of the time, I believe.

Q. Can you recall this conversation with Mr. Townsend?

A. Yes, I had him relate his experience, his technical background, and his general background in his own words. I wanted to know in his own words where he had been, what he had done, his experience, so I could be——

Q. Did he tell you that information? [104]

A. Yes, part of it.

Q. What else occurred in this conversation?

A. The discussion centered around his getting started at work there more than anything else. Inasmuch as we had no definite job in mind for him in the plant.

\* \* \*

Q. (By Mr. Holmes): Just state what Mr. Townsend told you in this conversation. What did he say about his need for a job?

A. He said that he had a few dollars in his pocket and had to have a job; his family was in

(Testimony of Thomas M. Lindley.)

Los Angeles, I believe, with relatives, and he wanted to bring them to Antioch at the earliest moment.

Q. Did he say anything about the kind of a job he wanted?      A. No, he didn't.

Q. What did you tell him? [105]

A. I told him his request was in the hands of our manager, who was trying to locate work. I pointed out to him that the company had several plants, and it might be possible that he would have to go to one of the other plants to work. He stated that he wanted to live in Antioch, preferred to live there. And my answer to that was, "Well, if that is the case, it might be a little longer getting something for you at the Antioch Division," because that narrowed down the field considerably. He made the statement that that was all right; that he could get by somehow until something showed. I told him that from that point on that our review—— [106]

\* \* \*

Q. (By Mr. Holmes): You were talking about this second conversation with Mr. Townsend after he arrived in Antioch, Mr. Lindley, and would you continue?

A. Yes. At that conversation, after the urgent business at hand was taken care of, I informed Mr. Townsend again that our procedure, our policy, was to examine all references, the background of every applicant; that we had some 23 applications for the job that he seemed to be most interested in; that those would be reviewed along with his and

(Testimony of Thomas M. Lindley.)

would be considered on the basis of the qualifications.

Q. I think you mentioned the Antioch Division. Would you identify it? What do you mean by that?

A. That is our plant in downtown Antioch; that is in Antioch proper. We are out of Antioch three miles.

Q. That is a separate plant from the plant you are working in? A. Yes.

Q. The San Joaquin division is a separate plant?

A. That's right.

Q. When you say the Antioch division you mean the other plant in Antioch, is that correct?

A. Yes.

Q. Anything else in your conversation that you recall?

A. As I said, I told him of our investigation we made, the time we had to do this; we were going to be very religious [108] about it, and consider everyone on the basis of qualifications.

\* \* \*

Q. (By Mr. Holmes): In this conversation did you tell Mr. Townsend that the salaried jobs were all filled but he could take his pick of any of the other jobs in the plant? A. No.

Q. Did he mention a particular job to you in this conversation?

A. He stated that he would prefer to go to work in the recovery department inasmuch as he had more experience in that department.



(Testimony of Thomas M. Lindley.)

Q. Did he tell you he wanted any particular job?

A. Yes, he had stated that he wanted a job as recovery operator.

Q. Did you tell him that he could have that job? [109]           A. No.

Q. Did you tell him in this conversation that the company would help him purchase a home?

A. No.

Q. Did you tell him in this conversation that the company would reimburse him or refund to him his traveling expenses?           A. No.

Q. How long did this conversation last?

A. The best I recall, something like 15 or 20 minutes.

Q. Is that all of the conversation? Have you related all that you can recall?

A. Yes, as near as I can recall.

Q. Did you do something after this conversation with respect to getting Mr. Townsend a job somewhere?           A. Yes.

Q. What did you do?

A. I took his request to the plant manager and he processed it, or rather he attempted to provide Mr. Townsend with work, which we did.

Q. I want to know just what you did. You spoke to the plant manager about getting him a job?

A. Yes.

Q. Is that all that you did?           A. Yes.

Q. From that point on it was out of your [110] hands?

A. I informed Mr. Townsend that from that

(Testimony of Thomas M. Lindley.)

point on his contact with the plant personnel, as far as I was concerned, would be with the personnel department.

Q. When did you see Mr. Townsend again or talk to him again?

\* \* \*

A. He was at the plant a month or so later inquiring about conditions and how things were going.

Q. How long did you talk to him on that occasion?      A. Not more than five minutes.

Q. Did he talk to you about employment of him personally?

A. Yes, he asked about when we were starting up and if he was going to get the job in the recovery department.

Q. What did you tell him?

A. I told him that our applications had not been processed; we had not received answers from our questionnaires we had mailed; the review of his case was not complete.

Q. When did you see or talk to Mr. Townsend after that?

A. He talked to me one time in the plant. He called about, or rather, he stopped me in the plant stating that he was——

Q. Can you place this as to date at all? [111]

A. It is very hard, because he was in and out of the plant there. I would see him but wouldn't speak to him, and there is so many people there it is very hard.

(Testimony of Thomas M. Lindley.)

Q. Was it several weeks later or several months later?

A. I would say it was two or three months, possibly five months; it was quite some time.

Q. Would that place it in the spring or summer of 1949?

A. That would place it in the spring, say in the month—possibly in the month of May. [111A]

Q. What occurred on this occasion?

A. He stated that the boys over at the Antioch division were railroading him; he had been elected a delegate to the conference at Portland, or up in Oregon somewheres, and he wanted to go, and as soon as he could be transferred to the San Joaquin division as a permanent employee, he couldn't go to that conference.

Q. What did you tell him?

A. I told him I had no need for him at the plant at that time; therefore I couldn't request a transfer.

Q. Anything else said in this conversation?

A. I don't recall anything pertinent.

Q. Anything else that you do recall whether you think it is pertinent or not?

A. No, I don't recall anything else.

Q. All right. When did you see or talk to Mr. Townsend again after that?

A. He came to the house, or called, rather, by telephone, and came to the house and wanted to talk to me about his employment, and I told him that——

(Testimony of Thomas M. Lindley.)

Q. When was this?

A. This was in June or July; I am not positive of the dates.

Q. In 1949? A. '49.

Q. You say he called the house by phone? [112]

A. He called the house, wanted to talk to me, wanted to know if I would be home. I told him yes, to come on out if he wanted to, which he did, and he reiterated his desire to go to work at the plant.

Q. What did you tell him?

A. I told him that we had not come to a conclusion on the application; on the basis of what we had seen it was not good; all of our answers that we were getting were of an adverse and that it didn't look favorable, but we hadn't come to a definite conclusion.

Q. What did he say?

A. Well, he informed me again about the people at Antioch, union people at Antioch, and the union he belonged to railroading him, and he was a victim of circumstances.

Q. Did he explain that to you at all, what he meant by being railroaded or being a victim of circumstances?

A. No; I didn't ask him for an explanation; I wasn't interested in that part of his—

Q. What did you say to him then after he mentioned that?

A. I told him to come to the plant in another week or so and we would give him a final answer.



(Testimony of Thomas M. Lindley.)

Q. Anything else said in that conversation?

A. I am unable to recall.

Q. You say you don't recall anything else in that conversation? [113]

A. No.

Q. All right. When did you see or talk to Mr. Townsend after that? Strike that a moment. Was there anyone else present at the time you talked to him in your home?

A. Yes, I believe some friend of his was with him.

Q. You don't recall who he was?

A. I believe it was this man Fisher that he spoke of—brother-in-law, I believe; some relative.

Q. All right. After this conversation at your home when did you see or talk to him again?

A. In August, the latter part of August, he called wanting to know if I would be at the plant on such and such a date, I believe it was on the following Saturday. I told him I was at the plant every day. And then he called later stating that he couldn't be there the Saturday and wanted to know if he could be there Sunday. So I told him to come out.

Q. Did he come out to the plant on Sunday?

A. Yes.

Q. And you talked to him?

A. Yes.

Q. Where did the conversation take place?

A. In our personnel office.

Q. Was there anybody there besides you and Mr. Townsend?

A. No.

(Testimony of Thomas M. Lindley.)

Q. What did Mr. Townsend say to you when he came in? [114]

A. His words were "Well, am I still—am I going to be hired, or what is the status of my application?"—something of that nature.

Q. What did you tell him?

A. I outlined to him briefly what we had then—what we had gone through in checking the records. I informed him that his application did not stand up with others that we had. I had informed him before we were going to judge his application along with others, and that his was not favorable as other applications were, and therefore we would not consider him for a position in the pulp mill.

Q. What did he say?

A. He says "Well, I don't blame you" or something of that nature. "That has happened to me before." He said, "I have been the victim of rumors."

Q. He said that to you?                      A. Yes.

Q. What did you say?

A. And I said, "I can't base my decisions on rumors. I don't listen to rumors; they are flying thick and fast; I have to *stock* to facts."

Q. What did Mr. Townsend say?

A. He said, "Well, would you mind telling me where—who gave me a black eye" or "who is black-balling me," or something of that nature. I told him that I couldn't show him the company [115] records. I did state that on the face of his application there is a sentence asking if he had ever re-

(Testimony of Thomas M. Lindley.)

signed or been asked to resign, and he answered "no"; that we had one or two letters from his former employers stating that he was discharged, which was a direct falsehood. And that was about the only—only direct implication or reference to any particular letter.

Q. Did he say anything about those instances to you in this conversation?

A. Well, yes, he did say that again he had been blackballed; that he was misunderstood, the victim of circumstances in every case.

Q. How long did this conversation last?

A. Possibly ten or fifteen minutes.

Q. Was there anything else said that you recall?

A. He asked me—rather, he stated to me that he knew of a mill starting up up in Oregon and wanted to know if I was acquainted with anyone up there. I told him I was acquainted with the superintendent of the pulp mill, and he asked me if I would give him a recommendation. I told him no, I had nothing to base a recommendation on; I couldn't give him a recommendation because I didn't know anything about him other than what other people had told me, and that wasn't public property. Therefore I could not give him a recommendation. And he wanted the name of the man, and I told him the man's [116] name. And he asked if it was all right if he called. I said "It is none of my business; of course you can call him." And he also stated, "I suppose you are going to blackball me." I asked him what he meant by blackball, and he



(Testimony of Thomas M. Lindley.)

had an answer; I don't recall exactly what it was. I told him that the records we had were company business; that it wasn't for me to give it to other companies or to blackball anyone in any way. And that was about the end. He stated that he did not hold any ill will against me for my actions.

Mr. Townsend made several statements talking in generalities, which I don't recall all of them.

Q. Was there any other part of the conversation that you do recall? A. Not at the moment, no.

Q. Did you tell Mr. Townsend in that conversation that you were refusing to hire him on the basis of stories you had heard about him? A. No.

Q. Did you tell him that you were refusing to hire him on the basis of rumors? A. No.

Q. What did you do with respect to Mr. Townsend after he left? Did you advise anybody that you had——

A. I advised our personnel department of our conversation for the records and of my [117] decision——

\* \* \*

Q. (By Mr. Holmes): Did you tell Mr. Stitt of your decision? A. No.

Q. When did you see or talk to Mr. Townsend again?

A. Every once in awhile out in behind—rather in the time alley, exchanged the time of day.

Q. You say you exchanged the time of day with him? A. Yes.



(Testimony of Thomas M. Lindley.)

Mr. Garry: When?

The Witness: I don't recall the date.

Q. (By Mr. Holmes): Can you state how long after this occasion when you told him you weren't going to hire him? A. No I couldn't.

Q. And then did you see him or talk to him after that?

A. I don't recall another conversation. I would see him from time to time in town, of course.

Q. Did you ever talk to him about a job——

A. No. [118]

Q. After this one instance when you told him you weren't going to hire him? A. No.

Q. You haven't talked to him about a job since then? A. No.

\* \* \*

Q. (By Mr. Holmes): When did the recovery department start in operation?

A. Continuous, the latter part of—the first part of September, latter part of August.

\* \* \*

Q. You say in the month of September?

A. In the month of September on a continuous basis.

Q. What do you mean by continuous basis, in work operation?

A. Yes, our plant is operated on a 24-hour basis. We had fired the boiler a few times prior to that for experimental trying out the tubes and so forth.

Q. Did you have your crew hired when you started up in [119] continuous operation?

(Testimony of Thomas M. Lindley.)

A. Yes.

Q. How long before that time did you have your crew hired?

A. I don't recall exactly how long. We had some of the boys there sooner than others. It was our policy to bring the men in with the least possible loss of time between their former jobs and when they started in our plant.

Q. How long have you worked in pulp mills, Mr. Lindley?      A. Since December, 1930.

Q. Have you worked in pulp mills all of the time since that time?      A. Yes.

Q. You are familiar with the machinery used in pulp mills?      A. Yes.

Q. Was this mill at the San Joaquin division a new mill?      A. Completely new, yes.

Q. Was there any new type of machinery in the mill?

A. All of our equipment was the very latest type, yes.

Q. I don't mean whether or not the machinery itself was new or used; I mean of its type, was it a new type?

A. No, it is all conventional equipment.

Q. Did any of the processes or equipment differ from what you had used before in the industry?

A. No, not basically.

Q. In the pulp industry is it common to have a so-called [120] paper mill and a so-called pulp mill together in the same plant?

(Testimony of Thomas M. Lindley.)

A. That is always the case. In most cases, that is true.

\* \* \*

Cross-Examination

By Mr. Garry:

Q. Mr. Lindley, how old a man are you?

A. Thirty-six.

Q. Thirty-six. And you have been in the pulp mill business since 1930, is that right?

A. That's right.

Q. Where have you worked?

A. Port Townsend, Washington, Tacoma, Washington, and at Antioch.

Q. In Antioch. Did you ever work in Oregon?

A. No.

Q. When did you come to work at Antioch?

A. My employment began with Fibreboard September or October [121] 1st, 1948.

Q. October 1st, 1948?           A. Yes.

Q. And are you still with them, Mr. Lindley?

A. Yes.

Q. What are your duties and work that you are doing there beginning with October 1, 1948?

A. My—one of my duties was to organize crews for starting up that plant; assist in the construction of the plant where possible.

Q. Did you ever have a superintendent's job before?           A. No.

Q. This is your first employment as a superintendent, is that right?           A. Yes.

(Testimony of Thomas M. Lindley.)

Q. When you started to work there October 1, 1948, did you know that the firm you went to work for had advertised in papers, trade journals, throughout the United States looking for paper pulp mill men, recovery operators and so forth?

A. Yes, I was aware of that.

Q. You were familiar with that? A. Yes.

Q. Do you recall what those advertisements said?

A. No. [122]

\* \* \*

The Court: Do you recollect what was in the ad?

The Witness: Not word for word; it was just a small ad for experienced pulp and paper mill workers.

The Court: You don't have to say what was in it. All I want to know is do you recall what was in it?

The Witness: I recall part of it.

Q. (By Mr. Garry): Were you given any rules or directions on how you were to employ anyone on October the 1st when you went to work there?

A. Yes.

Q. Were you given a list of those applicants and people who had inquired for employment?

A. Yes. [123]

Q. Were you familiar with the name of Mr. Townsend when you received the telephone call on October 18, 1948?

A. Not distinctly familiar, no.

Q. Mr. Lindley, didn't you tell Mr. Townsend that you had the application before you; you had



(Testimony of Thomas M. Lindley.)

read his application, and that you were familiar with what Mr. Stitt had written? Didn't you tell him that?      A. No.

Q. You never did?      A. No.

Q. Well, then, is it your testimony then, Mr. Lindley, that when Mr. Townsend telephoned you on October 18, 1948, that you were a complete stranger to the name of Mr. Townsend?

A. No, that is not correct.

Q. Will you tell us what is correct?

A. Mr. Townsend, stated, as I told you before, I said I had seen his application; that I had not reviewed it; I had no opportunity to do so. I recognized the name because it was one of many. Other than that I didn't know anything about him.

Q. I show you this Defendant's Exhibit B and ask you to look at it, please.

A. Yes, I have seen that before.

Q. You have seen that before.

A. Yes. [124]

Q. You saw that before you had the conversation with Mr. Townsend on October 18, 1948, did you not?

A. I merely counted—yes, I had seen it.

Q. And you knew that the work that he was applying for and the type of work that he had said that he was qualified for in this application, did you not?      A. Yes.

Q. And, Mr. Lindley, you had an opening for that kind of a position, did you not?

A. Not at that particular time, no.

(Testimony of Thomas M. Lindley.)

Q. Well, you——

A. The plant was not complete.

Q. But you knew, with your experience since 1930, that you had to have men qualified for that type of work?

A. That is correct.

Q. When the plant opened, isn't that right?

A. That is correct.

Q. And what was the type of work that Mr. Townsend was telling you that he was especially qualified to do?

A. Pulp mill work in general.

Q. And in addition to that, he told you about his experience as a tour foreman; isn't that right?

A. I don't recall him saying that over the telephone.

Q. He didn't tell you that?

A. I don't recall that. [125]

Q. You were familiar with the places that he had worked, were you not, from the application and also the conversation you had with him?

A. You mean the companies he had worked for?

Q. Yes. A. No, I was not.

Q. Did you make any notes of the conversation you had with Mr. Townsend, Mr. Lindley?

A. No, I didn't.

Q. In other words, the conversation you had with Mr. Townsend on October 18, 1948, which you testified to on direct examination took approximately ten minutes; isn't that right?

A. Approximately, yes.

Q. What time of the day or night was this?

(Testimony of Thomas M. Lindley.)

A. As best I recall, it was in the early afternoon.

Q. Where were you when the telephone call reached you?

A. I was in my office in the plant, or rather, in the main office.

Q. You were in the main office in Antioch?

A. Yes.

Q. Did you write down any notation or any notes?      A. No, sir.

Q. You didn't keep any diary of the conversation?      A. No.

Q. You did, however, write a letter on October 19, 1948, to [126] Mr. Townsend, did you not?

A. Yes.

Q. And that letter that you wrote, the facts of the letter, would it be your testimony that you just wrote what you remembered from the conversation the night before without any written memoranda?

A. That's right.

Q. How is it, Mr. Lindley, that from October 18, 1948, to the present time, how is it that you now recall what was said in that conversation that afternoon?

A. I recall the conversation as I have related it to you in this Court.

Q. I said, how is it that you recall it? What brings it to your memory?

A. I don't understand your question.

Q. This conversation, Mr. Lindley, took place in 1948 on October 18th.      A. Yes.

Q. Isn't that right?      A. Yes.



(Testimony of Thomas M. Lindley.)

Q. You must have had very many other conversations with people, occasions and circumstances. By your own testimony, Mr. Lindley, you have told us that you didn't keep a memorandum or a diary of the conversation you had; isn't that correct?

A. That is correct. [127]

Q. What I would like to know if you will tell the Court, how is it that you remember this particular conversation as to what Mr. Townsend said and as to what you said?

A. We were dealing in human lives; we weren't talking through our hat. What I told Mr. Townsend I had to back up. Mr. Townsend was making a move and I realized it. I pointed out to him definitely what he was faced with in moving him and his family from Alabama out to California. I remember those conversations very distinctly.

Q. In other words, you recall that Mr. Townsend—you recall from his application and you also recall the conversation you had with Mr. Townsend on that date, and he told you he had a family; isn't that right?

A. Yes.

Q. You remembered that? A. Yes.

Q. You also remembered that, Mr. Lindley, when you saw his application, did you not?

A. My first glimpse of Mr. Townsend's application was merely to classify it. There are seven departments—there are seven jobs in the pulp mill.

Q. And the only reason, Mr. Lindley, that you recall this conversation is because human lives were involved, is that right?



(Testimony of Thomas M. Lindley.)

A. That's right. It was very important to me that I tell [128] Mr. Townsend the facts; that we apprise him of the situation in California that he would be faced with on coming here. Mr. Townsend made it very clear to me that he would accept that—take that chance, to put it in his own words.

Q. I believe you testified, sir, that Mr. Townsend told you he wasn't working at the present time when he was talking to you?

A. He made that statement, yes.

Q. You knew from his application that he was working, did you not? [129]

\* \* \*

A. I didn't know that he was working, because I hadn't had a chance to study his application; I merely classified it.

Q. (By Mr. Garry): Did you know that he had stated in his application under the question of "Why do you wish to change?" "Wish to return to the Kraft Pulp Mill"? Did you know that that was in his application blank?

A. No, not at that time.

Q. Now, Mr. Lindley, you just told us that you remembered this conversation because you were dealing with human lives? A. Yes.

Q. In looking over these applications as you received them didn't you examine any of them from the standpoint, or this standpoint, to see why a man wants to go to work for your concern? Didn't you determine that? [130]

\* \* \*

(Testimony of Thomas M. Lindley.)

A. In answer to that, at the time I received Mr. Townsend's phone call, I had had no opportunity to make a study of the applications; I only classified them as to departments.

Q. (By Mr. Garry): Mr. Lindley, so I don't have to go through every one of these items, let me ask you this question: What did you notice in this application so that you were able to classify Mr. Townsend's application?

A. He stated in there that he was qualified for several jobs. I marked it for one department that appeared to be the most likely from the standpoint of his experience, and I classified it as such.

Q. When you say you marked it, did you mark it before you had the telephone conversation with Mr. Townsend?

A. I don't recall definitely whether I did or not.

Q. Do you recall making a mark on the document at all?

A. I don't recall. I don't do that. The personnel office makes the marks. [131]

Q. You said you marked something. What were you referring to?

A. What I meant was that I asked the personnel manager's secretary to note the department, recovery department, and put it in that file. I presume she put a red mark on it of some kind.

Q. Did you make your request in writing or by an oral statement? A. By verbal request.

Q. In other words, was she in the same office with you at the time?

(Testimony of Thomas M. Lindley.)

A. She was in the same building.

Q. In the same building? A. Yes.

Q. How did you communicate with her?

A. I carried it from my office out to theirs.

Q. You took the application and went in there and gave it to her, is that right?

A. No, no, the applications were processed in batches, and they came in every morning and I picked the ones that we were through with, that is, that we had had a chance to give a passing look at and classify. Mr. Townsend's application had been there some time prior to my coming to the employ of the company.

Q. Did Mr. Stitt call your attention to Mr. [132] Townsend? A. No.

Q. You don't recall how you got this information over to the girl in the classification or the personnel office, do you?

\* \* \*

A. I don't recall exactly what method we used for conveying the information from one office to another. When I arrived there all of these applications were there, and they were put in my file cabinet. As I reviewed them, I put them on the desk and they were picked up. I don't recall just what method they used to do it.

Q. (By Mr. Garry): Mr. Lindley, you had a conversation with Mr. Townsend in the afternoon on the 18th in your office. [133]

\* \* \*

(Testimony of Thomas M. Lindley.)

Q. (By Mr. Garry): You had this conversation with Mr. Townsend over the telephone, is that right?

A. That is right.

Q. After you got through with the conversation, Mr. Lindley, what did you do?

A. I immediately went to the personnel office, asked for his application. I told the girl there—I dictated an answer, or rather, a confirmation of our telephone conversation, where he would get it immediately.

Q. When you said you went there immediately, did you do it the same afternoon, or did you do it the following day?

A. I did it that afternoon. Whether it was mailed that afternoon I don't know.

Q. But you went right over there, right after you got through talking to him, isn't that right?

A. Yes.

Q. At that time when you went over there and you pulled his application out, did you study it?

A. I asked where to pull it out. She let me [134] see it.

Q. You saw it?

A. Yes.

Q. Did you have an opportunity to fully study it at that time?

\* \* \*

Q. (By Mr. Garry): You did take the application out and study it, is that correct? [135]

A. No, I didn't give it a detailed study at that time, for I didn't have time to. Mr. Townsend, was, according to his story, very desperate, and he had,



(Testimony of Thomas M. Lindley.)

as he stated, his—he was determined to come out here regardless of whether we gave him a job or not.

Q. You say Mr. Townsend told you he was very desperate, is that correct? A. Yes.

Q. You made a mental note of that, is that correct? A. That's right.

Q. When you took the application out, didn't you notice on the application blank "Are you employed at present?"

Answer, "Yes.

"Employer's name and address?

"Otis Elevator Company, New York City, New York."

A. That application was made prior to our telephone conversation; therefore I couldn't take it against his word.

Q. Didn't that thought occur to you, Mr. Lindley? Now you are in charge of this department; you are hiring men to work in your department, in your pulp mill, isn't that right? That was your task? A. That was my duty, yes.

Q. Didn't the thought occur to you to determine whether this man was really unemployed?

A. No. [136]

Q. You saw a discrepancy between what he said to you over the telephone and his application blank, did you not?

A. No, I didn't. I didn't say I did.

Q. And you didn't notice this portion of the application blank?

(Testimony of Thomas M. Lindley.)

A. What way would I have of knowing whether he was working or not?

Q. He said it in writing——

A. This was prior to our telephone conversation.

\* \* \*

Q. (By Mr. Garry): Mr. Lindley, I call your attention to Plaintiff's Exhibit No. 3, a letter sent by you to Mr. Townsend. Will you read that, please? A. In its entirety?

Q. Yes, so you will be familiar with it. [137]

\* \* \*

A. I recognize it as having written it.

The Court: That is the letter you wrote?

A. Yes.

Q. (By Mr. Garry): You remember that letter, do you not? A. Yes.

Q. That is the letter you wrote after you had the conversation with Mr. Townsend?

A. Yes.

Q. You told Mr. Townsend, you testified earlier on direct examination, that you had no authority to hire anyone over the telephone; is that correct?

A. Yes.

Q. Then how do you account for the fact of inviting Mr. Townsend to come down and you would have a job for him?

A. I stated in my letter that if it was his desire to come to the Coast we would try to place him, or we would place him.

Q. You didn't say anything in this letter that

(Testimony of Thomas M. Lindley.)

he would have to pass a physical examination, did you?

A. I had told him that over the telephone.

Q. You didn't tell him anything about the fact that his application would have to be passed upon in this letter that you wrote to him, did you? [138]

A. No.

\* \* \*

Q. (By Mr. Garry): Mr. Lindley, I call your attention to this letter of October 19, 1948, where you said that "We were pleased to receive your telephone call of October 18th. In line with our conversation, the new mill is still under construction and it will be about the first of March before actual operations begin. However, if it is your desire to come to the Coast at an earlier date, we will place you in one of our mills at whatever they might have for you until we begin operating." [139]

\* \* \*

Q. (By Mr. Garry): I believe in your direct testimony, Mr. Lindley, you stated that nothing was said about housing by Mr. Townsend over the telephone; is that correct?

A. I don't recall that I said anything. I didn't say anything about housing. I believe I did mention housing—that was a very critical thing at the time; we were very much concerned about it.

Q. You say you believe you did?

A. My statement was that we didn't—I made no commitment or promise of housing it *it* in any

(Testimony of Thomas M. Lindley.)

way. I informed him of the housing situation in Antioch. [141]

Q. You just thought of that now after reading this letter, did you not? On your direct examination I believe the question was asked you if you mentioned any housing to Mr. Townsend, and I believe your answer was that you didn't; is that correct? A. I cannot recall.

\* \* \*

The Court: But the thing I am interested in, what is your independent recollection of what you told Mr. Townsend about housing?

The Witness: I related to Mr. Townsend here the critical situation about housing. I informed him something about the situation on sales, rentals were practically non-existent, and something about the price range. [142]

\* \* \*

Q. (By Mr. Garry): Then, Mr. Lindley, because you read this letter a few moments ago that I handed you, this conversation on housing was refreshed in your memory, is that right?

A. No, that is not right.

Q. Did Mr. Townsend ask you if he could buy a home there? A. No.

Q. Over the telephone?

A. No. He asked about housing.

Q. What did he ask you about housing?

A. I don't recall his exact words.

Q. You had already testified that Mr. Townsend



(Testimony of Thomas M. Lindley.)

told you he was in desperate financial circumstances?      A. Yes.

Q. Isn't that correct?      A. Yes.

Q. And yet you write him a letter and say, "However, there are some homes available for purchase ranging in price from \$6500 to \$9000."

A. I attempted to inform him of the situation.

Q. As a matter of fact, Mr. Lindley, you were very anxious to [143] have Mr. Townsend come down there because you were desperate for a crew to start in your plant, you were trying to get ready; isn't that correct?      A. No, that is not true.

Q. You weren't anxious?      A. No.

Q. How many applications had you received up to that time for recovery work?

A. We received some 20—I don't recall; between 20 and 30 applications.

Q. 20 and 30 applications?

A. As my memory serves me.

Q. How many men did you need?

A. I needed four.

Q. You needed four men?      A. Yes.

Q. You needed four men. Is that why you advertised in all these trade journals?

A. We are only speaking of one job.

Q. I am talking about pulp mill work.

A. I understood your question to be about the recovery plant.

Q. I am talking about the pulp mill work. You were developing a crew for that, were you not?

A. I am a little confused. Will you start over

(Testimony of Thomas M. Lindley.)

again on this line of questions and we will get started out right? [144]

Q. How many applications had you received from advertisements in trade journals on October 18, 1948?

A. I don't recall the exact number; there was possibly over a hundred.

Q. Over a hundred? A. At least.

Q. At least?

A. I recall that much about it.

Q. How many men did you need in this recovery—new plant that you were opening up, no matter where you put them?

\* \* \*

Mr. Garry: I meant the whole plant. He has already said he needed four in that plant.

The Court: You used the word "recovery" and that may have been confusing.

Q. (By Mr. Garry): How many men did you need in the pulp mill work?

A. We needed approximately 68.

Q. You needed 68 men?

A. Yes. Of that 68 we had planned to absorb as many local [145] people as possible so that would cut down the number on the outside, people coming into the pulp mill, to approximately 25.

Q. Then for these 25 men that this entire new plant needed you were advertising in trade journals all over the United States; is that your testimony?

A. Your word in there—

\* \* \*

(Testimony of Thomas M. Lindley.)

The Court: Your position is, I take it, you want to get at the fact of how many trade journals they did advertise in and for what.

Mr. Garry: That is right.

The Court: Let's get to that phase of it, then.

The Witness: To the best of my knowledge——

The Court: I will overrule the objection, and the question has been reframed in accordance with this discussion. [146]

A. To the best of my knowledge they only advertised in the Southern Pulp & Paper Industry. That is a trade journal that is of interest only to the pulp industry.

The Court: What were you trying to get from those advertisements?

A. For the pulp mill, the department I was interested in, we were trying to get in the neighborhood of 25 or 30.

Q. Of any specialized type of work?

A. For the various departments, yes, for skilled work.

The Court: Is there anything further you want to know about that?

Q. (By Mr. Garry): At the time you had this conversation with Mr. Townsend, Mr. Lindley, how many men did you actually need on that afternoon?

A. As I have stated before, in the neighborhood of 25 to 30 men.

Q. You needed 25 or 30 men, is that correct?

A. For the entire pulp mill.

(Testimony of Thomas M. Lindley.)

Q. You were very anxious to have Mr. Townsend?  
A. No, I wasn't anxious.

Q. ———come to California?

A. No, I wasn't anxious.

Q. Then why did you send him a letter on October 19, 1948?

A. Due to the urgency of his situation as stated to me over the telephone, we were trying to help him out. [147]

Q. You were trying to be charitable, is that it?

A. That's right; that's it exactly, because we didn't need him at that time.

Q. Just trying to help Mr. Townsend out?

A. We didn't need him at that time. We were unable to place the people we were getting in the area; there was considerable effort and trouble on our part to place these people coming in here in the other plants. We were burdening the other plants with our men. At the time of our telephone conversation, I couldn't foresee starting up that plant; therefore Mr. Townsend's entrance here or appearance here was a detriment to us.

Q. Didn't you tell Mr. Townsend that you expected the plant would open in March?

A. As near as I knew at that time, that was my thinking.

Q. That wasn't very far away from the time you wrote this letter, was it?

\* \* \*

A. Well, that telephone conversation was in Oc-



(Testimony of Thomas M. Lindley.)

tober and this letter was written in October. I would say that from March, I was trying to foresee considerably more than I knew [148] about. We were having—at the time we wrote that we were having a strike there at the plant; we didn't know how long the strike would last.

Q. (By Mr. Garry): You didn't know how long what would last?

A. There was a strike on at the plant, and we had no idea how long it would last.

Q. There was a strike on at your plant. Where was the strike?

\* \* \*

Q. Where was the strike?

A. The strike didn't concern Fibreboard itself. The only [149] thing concerned—it was construction labor that was on strike, not anything to do with us. It merely held up construction of the plant. Therefore, it made it much harder to foresee any start-up date.

Q. In other words, it was a strike that was going on in connection with the new plant?

A. With the construction of the plant.

Q. Did you recall from the application of Mr. Townsend that Mr. Townsend had had experience setting up new plants?

A. No.

\* \* \*

Q. (By Mr. Garry): Did Mr. Townsend tell you when he would be in California?

A. No, he did not.

(Testimony of Thomas M. Lindley.)

Q. He didn't tell you that he would be there on the 15th day of November, 1948?

A. No, he did not.

Q. He could have said that and it might have escaped your [150] memory? Could that be possible?      A. It is possible.

Q. Do you recall the date that you saw Mr. Townsend?

A. No, I don't recall the date exactly.

Q. Do you keep a diary of it in your office, of the people you interview and people you talk to?

A. No.

Q. I believe that Mr. Townsend testified yesterday that he saw you on the 15th day of November. Would that be the approximate date?

A. It is possible, yes.

Q. What was the conversation that you had the first time you saw him?

A. The conversation was, as I stated this morning, about his arriving here. He mentioned briefly his family, about the trip they had enroute; and he was delivering a car somewheres down around San Francisco, and he wanted to know what the possibility was of going to work. That is the sum and substance of that.

Q. He had this letter dated October 19th with him too, didn't he?

A. I don't know whether he did or not.

Q. As a matter of fact, he showed it to you, did he not, and said, "I brought this with me. Here

(Testimony of Thomas M. Lindley.)

I am, 'Alabam' Townsend''? Didn't he say something like that to you?

A. No, I don't know if he did. I wouldn't say he did or [151] didn't. Announcing his arrival was enough.

Q. How long did that conversation last?

A. A very few minutes. I don't recall how long it lasted.

Q. When did you see him again?

A. Some week or so later; after he delivered his car.

Q. A week later?

A. I don't recall exactly; possibly a week; maybe a little longer.

Q. You say you saw him again about a week later?

A. I don't recall whether it was a week or a week and a half or three days; it was some short period of time.

Q. When did Mr. Townsend go to work for the Fibreboard Company?      A. I don't know.

Q. The second time you had a conversation with him, I believe it was your direct testimony, was it, that you say Mr. McCuish was with you in the office?      A. Yes.

Q. What time of the day was that?

A. I believe it was in the forenoon; I don't recall about the hour.

Q. And that is the second time you had seen Mr. Townsend; is that your testimony?

A. As best I recall, yes.



(Testimony of Thomas M. Lindley.)

Q. Did he go to work that same day? [152]

A. No.

Q. When did he go to work?

A. I don't know.

Q. Would it make any difference in your time of his starting if I was to tell you that Mr. Townsend went to work on the 22nd day of November, 1948?

A. I don't know as it would. Mr. Townsend was told when he came back that we would try to place him; that the other division known as the Antioch Division would take him on as soon as they had an opening. I don't recall the exact date he went to work. He was out around the plant a few times; he was out around the time rack a few times, and some three or four days later the Personnel Department informed me that Mr. Townsend was employed at Antioch. I inquired every day as to what progress they had made. The best I recall it wasn't over a week after his second appearance after he was put to work. [153]

\* \* \*

Q. (By Mr. Garry): Mr. Lindley, calling your attention to the first time that you had a conversation with Mr. Townsend in Antioch, you say that conversation only took a couple of minutes?

A. A very few minutes.

Q. And the next time you had a conversation it took about 15 or 20 minutes, isn't that correct?

A. I don't recall off hand now how many minutes



(Testimony of Thomas M. Lindley.)

it was. It was sufficient for an interview for the purpose we had in mind to determine his possible candidacy for the job.

Q. Did Mr. Townsend at that time show you any papers or notebook of any kind to help you out in your new job?      A. No.

Q. You don't recall him offering you a shift report on what happened in different shifts in the operation of a new plant?

A. I don't recall any such thing, no.

Q. By this time had you seen the recommendation that Mr. Stitt returned after making a copy for the company, the recommendation of the North Carolina Pulp Mill Company? (Showing [155] paper to witness.)

A. Yes, I had seen that, I believe.

Q. Had you seen that prior to the time you had the telephone conversation with Mr. Townsend?

A. No.

Q. Did you see it before you wrote the letter to Mr. Townsend?

A. No, I don't believe so; it may have been among his—in his file, but I didn't—as I stated before, I didn't study that file, and therefore I wouldn't be——

Q. Did anyone authorize you or direct you to write that letter to Mr. Townsend on October 19, 1948?      A. No.

Q. You did that entirely of your own accord?

A. Yes.

Q. Didn't discuss it with Mr. Stitt?

(Testimony of Thomas M. Lindley.)

A. I seem to recall there was some discussion between—no, I don't believe there was. I couldn't say there was.

Q. Did you discuss it with Mr. McCuish?

A. Well, Mr. McCuish's office took care of all of our correspondence.

Q. You made the statement this morning, and at the end of your conversation you turned and spoke to the plant manager and you said that from that time on the "Personnel Manager will handle all matters pertaining to you," referring to Townsend?

A. You are asking me a question? [156]

Q. Yes. Did you make that statement?

A. Yes.

Q. What did you have in mind when you said that to him?

A. That the personnel office would handle all contact between the other division and ours regarding Mr. Townsend's temporary employment and I wouldn't have anything to do with that; that would be handled through the personnel department. Therefore, Mr. McCuish would know—would be the first to know when they had—or, rather, when one of the other divisions had a place to put Mr. Townsend.

Q. And you weren't making a reference at that time to the recovery plant foreman, recovery man's position, that you had discussed with Mr. Townsend?

A. No.

Q. You did discuss in this conversation that you

(Testimony of Thomas M. Lindley.)

were planning to use Mr. Townsend in the recovery room, did you not?

A. That was the department that his file or his application was placed under.

Q. I asked you if you discussed that with him?

A. With who?

Q. With Mr. Townsend. A. At what time?

Q. At the time that you had this conversation that on direct examination you said took 15 or 20 minutes and now you don't recall how long it [157] took.

A. We discussed the recovery job, yes.

Q. You said you saw him again about a month after that?

A. I believe so, out in the plant.

Q. You don't recall the exact date?

A. No, I don't.

Q. You have never made any memorandum or any data in reference to any conversation you had with Mr. Townsend, have you?

A. No, not especially.

Q. Then the next time you saw him—I am just following your own chronological statement of when you saw Mr. Townsend—you stated this morning you saw him twice immediately after he came back?

A. Yes.

Q. And you saw him again one month later?

A. I didn't remember saying a month; I don't recall exactly the period of time that elapsed between our first two meetings and the time out in the plant that I talked to him. I have no recollec-



(Testimony of Thomas M. Lindley.)

tion directly of the time involved there; possibly a month or so.

Q. Then you said that you saw him again a couple of months later; then you made the time about May. You said at that time that Mr. Townsend told you that the boys were railroading him; isn't that right?

A. No, I didn't say that at that time. At the time that Mr. Townsend made the statement that the boys were railroading [158] him was when he was out at our plant on a temporary assignment some time——

Q. When was that, sir?                      A. Sir?

Q. When was that?

A. I believe that was in May; in the late spring; April or May some time.

Q. That is what I asked you, if it was some time in May.

A. That is correct; it was some time in May.

Q. The boys were railroading him?

A. That's right.

Q. As a matter of fact, Mr. Lindley, the discussion about railroading didn't occur until a long time after, in August; isn't that a fact?

A. He had been over at the plant from the time he came there in November until the Unions were electing their delegates for the general convention, and that was just prior to that time that he talked to me and tried to get me to request his transfer.

Q. Mr. Lindley, isn't the convention that you are speaking of some time in September?



(Testimony of Thomas M. Lindley.)

A. No, that is in June.

Q. Then you also testified that the next time you saw Mr. Townsend was some time in June or July, when he came to your house, is that [159] correct?

A. Yes.

\* \* \*

Q. (By Mr. Garry): And you also testified at that time Mr. Townsend had someone else with him?

A. At the time Mr. Townsend came to my house his brother-in-law, I believe, was there—was with him.

Q. What was the discussion you had with him at that time?

A. His possible employment with us.

Q. What was said, do you recall?

A. I don't recall the entire conversation. I recall that Mr. Townsend wanted to know whether or not he was going to work out there; how he stood in the lineup of applications. And I remember telling him that his references that he had given us weren't too good, they weren't too favorable, and it was somewhat doubtful.

Q. You told him this about June or July and you say that this happened at your home, is that correct?

A. Yes.

Q. As a matter of fact, Mr. Lindley, didn't this conversation take place in your home February 8, 1949, and not in June or July?

A. In June or July is the best I can recall.

Q. And you have no independent recollection of the time at all? [160]

(Testimony of Thomas M. Lindley.)

A. Not exactly, no.

Q. As a matter of fact, the conversation at that time between you and Mr. Townsend was over Mr. Fisher gaining employment in the plant?

A. No.

Q. And it had no reference at all—wait until I finish the question, Mr. Lindley, then you can say “No” or “Yes”—had no reference at all to the discussion between yourself and Mr. Townsend as to employment or the lack of employment?

A. Are you finished?

Q. Yes.

A. His statements to me were as I stated to you before. He wanted to know about his possibility of employment. He made several statements— I questioned him somewhat about his statements that he had never been fired. I didn’t like that, and I wanted to explore that a little to help me make up my mind.

Q. Did you send for Mr. Townsend?

A. No.

Q. Then why did he come down to see you? Your plant wasn’t operating, was it?

A. I have stated as far as I know the reason; there he is; you can ask him why he came to see me. That is all I know, is his questions that he asked me.

Q. Did you have his file at your home when you were talking to [161] him?

A. No, I didn’t.

Q. Did you report this conversation you had with

(Testimony of Thomas M. Lindley.)

Mr. Townsend on this day at your home to anyone?

A. No, not that I know of.

Q. Mr. Lindley, have you discussed this case with anyone? A. Yes.

Q. Who have you discussed it with?

A. With it seems to me everyone in Antioch. Mr. Townsend is a very unusual figure, and it was quite involved. This Townsend case has been bothering us for quite some time. We have two other suits, as I recall, and Mr. Townsend, you will have to admit, is a very unusual man, and you couldn't escape discussing with someone his case. I have discussed his case with many people.

Q. When did you first start thinking what the conversation was about on October 18th? When is the first time you had occasion to discuss that conversation with anyone?

A. October 18th—was that our telephone conversation? A. Yes.

A. I don't recall when it was brought out.

Q. You don't remember that?

A. I don't recall who I discussed it with off hand.

Q. Did you discharge Mr. Townsend?

A. I couldn't discharge a man that had never been hired. [162]

Q. You were in court yesterday, were you not?

A. Yes.

Q. You heard Mr. Townsend say that he had a meeting with you? A. Yes, sir.

Q. Which at one time was set for Saturday



(Testimony of Thomas M. Lindley.)

morning, and the because he was working that day he called you and made the meeting with your permission on a Sunday; isn't that correct?

A. I believe that is substantially correct, yes.

Q. I believe the date on that would be August 28th. You heard his testimony that you told him that "Townsend, due to rumors I am not going to hire you; I am going to discharge you." Did you make such a statement, or did you not?

A. I did not.

Q. What did you tell him on that day?

A. I have already related what I told Mr. Townsend on that day.

Q. Do it again if you will, please.

A. I told him that we had studied his case; we had the answers of his former employers; we knew how many times he had moved from one job to another; I had gone into his technical background and, therefore, we didn't feel that he was—his application was up to the standards that we were hiring.

Q. Had you done all that, Mr. Lindley?

A. Yes.

Q. As a matter of fact, you had done all [163] that? A. Yes, sir.

Q. Had you gone into his technical background?

A. Somewhat, yes.

Q. In what way did you go into his technical background?

A. I established that he didn't have any.



(Testimony of Thomas M. Lindley.)

Q. Did you investigate the recommendations from the North Carolina Pulp Company?

A. Yes.

Q. And did you find that their recommendations were any different from that recommendation dated February 1, 1944, which your office copied before they sent him the letter of September 1, 1948?

A. I didn't take into consideration anything that was in our files prior to the time—as far as the recommendation I am speaking of, it wasn't taken into account, any of his antecedents, any of his recommendations that he gave us. Anyone can pick up any amount of recommendations. That doesn't mean a thing.

Q. Mr. Lindley, I think I asked you a very simple question. The question I asked you is, did you investigate the recommendation dated February 1, 1944, of the North Carolina Pulp Company?

A. I don't recall specifically that we investigated with that company. I believe we did.

Q. You don't know whether you did or you [164] didn't?

A. I couldn't say for sure we did or I couldn't say for sure we didn't.

Q. Do recall the elections for a delegate in the Union on or about the 1st or 2nd or 3rd of August, 1949?

A. No, sir.

Q. You don't remember that?

A. I know nothing about it.

Q. Mr. Lindley, isn't it a fact that you had

(Testimony of Thomas M. Lindley.)

planned on giving Mr. Townsend the job, he had been fully, completely satisfactory, until you found in your examination that Mr. Townsend had been a former organizer for the paper mill and pulp sulphite workers?      A. No, sir.

Q. That is not true, is it?

A. That is not true.

Q. You haven't made any such statement to anyone in Antioch?      A. No.

Q. Can you tell me, Mr. Lindley, while you are sitting there just in what way did Mr. Townsend not measure up to any of the things that he had put in the application and the application that he had made for the job as a recovery man?

A. We had two letters, I believe, with adverse comments on him about his character. We had one letter stating that he had been fired for fighting on the job. His application directly says on the face of it that he was never—he says that he was [165] never fired. This letter from this company states that he was. It had been several years prior to the start up of our mill since Mr. Townsend had been actively engaged in pulp mill work. Some of our equipment was much more modern than any he had had acquaintance with. There was many reasons for it.

Q. Mr. Lindley, when did you discover all this?

A. In the process of examining his application.

Q. His application blank, as I remember it, and as you have already indicated that you examined, showed that he had not been actively engaged in

(Testimony of Thomas M. Lindley.)

anything except as a tour foreman from 1940 to 1945 and that he had not followed the paper industry since then. He had already made that very clear to you, had he not?

A. Part of that was on the face of his application, yes.

Q. And he had already told you that, had he not, sir?

A. I don't know that he did or didn't.

Q. As a matter of fact, you don't remember what was said or what wasn't said; isn't that right?

A. I recall very clearly.

Q. Did you ever confront Mr. Townsend with any of these statements that you found and you assumed that they were not true? Did you ever confront him with those statements? A. No.

Q. You never did? A. No, sir.

Q. Did you discuss with Mr. Stitt, prior to August 28, 1949, before you had this conversation telling Mr. Townsend that you weren't going to engage him in the recovery room? A. No.

Q. You never had any such conversation; just took it upon yourself to do it?

A. I don't recall. It wasn't necessary for me to take it up with Mr. Stitt. I reviewed it with my immediate superior.

Q. Who was your immediate superior?

A. Mr. Cash.

Q. Mr. Cash? A. Yes.

Q. Did Mr. Cash know Mr. Townsend?

A. No, not to my knowledge.



(Testimony of Thomas M. Lindley.)

Q. Didn't you tell Mr. Townsend on August 28, 1949, "Townsend, you are too damned good a Union man to be working in here"? A. No, sir.

Q. You never made that statement?

A. No.

Q. Did you ever make a recommendation to anyone in your company, point out to them that you had found certain discrepancies in his application, and did you ever tell anyone that you had received communications that this man was not the man that you thought he was or purported to be?

A. No.

Q. You never did tell that to anybody? [167]

A. No.

Q. I didn't get the answer. A. No.

Q. I thought you said you discussed it with Mr. Cash.

A. I don't think I understood your question correctly.

\* \* \*

Mr. Garry: I will limit it just to the Company.

Mr. Holmes: Limiting that just to the Company, did you ever tell anyone in the Company?

A. Yes, I reviewed all the applications of everyone.

The Court: How about Mr. Townsend?

A. Yes, I did.

Q. (By Mr. Garry): With whom?

A. Mr. McCuish.

Q. Anyone else? A. No. [168]



(Testimony of Thomas M. Lindley.)

Q. Were these communications addressed to you?

A. They were addressed to our personnel department.

Q. And who gave them to you?

A. The personnel department.

Q. Who in the personnel department?

A. Mr. McCuish, I believe.

Q. Mr. McCuish gave you those communications?

A. Yes; that is, he didn't give them to me; he let me see them.

Q. When did you get those?

A. During the period of time that we were investigating Mr. Townsend's application.

Q. Mr. Lindley, can you give us a more definite date?

A. No; they don't come in on a certain date; there was a good many of them coming in; I don't recall the exact date.

Q. You say a good many of them came in. From whom?

A. From the different individuals. We were getting letters and references every day. There was too many to recall exact dates of everyone of them.

Q. Mr. Lindley, you have already stated that Mr. Townsend is a very unusual person?

A. Yes.

Q. You said on two prior occasions he has sued your company; isn't that correct?

A. Yes, sir.

(Testimony of Thomas M. Lindley.)

Q. And this case has been in progress since December, 1949; [169] isn't that correct?

A. Yes.

Q. You have known about this case during that time?

A. I believe so.

Q. You also stated that there were two communications that you received in reference to Mr. Townsend?

A. I said there was at least two.

Q. When did those two come in?

A. I don't recall.

Q. As a matter of fact, Mr. Lindley, there have been no such communications; isn't that right?

A. No, that isn't right.

Q. Who are they from?

A. His former employers.

Q. Who? A. I don't recall at the moment.

Q. Mr. Lindley, do you recall having a conversation with Mr. Townsend on the 28th day of August, the day that we are talking about right now, wherein you reprimanded him for writing to a banker by the name of Mr. Bean, and Mr. Bean wrote to you about the character and the references of Mr. Townsend? Do you remember that?

A. Yes, there was—I remember asking him a question; I didn't reprimand him. I was in no position to reprimand Mr. Townsend at any [170] time.

Q. What do you mean? How did you ask him a question?

A. I just asked him if he wrote to this man, who

(Testimony of Thomas M. Lindley.)

this man was, and what possible implication there was in writing to him.

Q. Who was that letter addressed to, sir?

A. I don't know.

Q. It wasn't addressed to you, was it?

A. It was a part of Mr. Townsend's record, and, as I have stated before many times, everything goes through the personnel. The chances are it was written to the personnel; possibly Mr. Stitt; I don't know. [171]

\* \* \*

GORDON V. McCUIISH

a witness called for defendant, sworn.

The Clerk: Would you state your name to the Court?

The Witness: Gordon V. McCuish.

Direct Examination

By Mr. Holmes:

Q. Are you a resident of Antioch, Mr. McCuish? A. Yes, I am.

Q. Are you employed by Fibreboard Products, Inc.? A. Yes.

Q. Were you employed by that company between October of 1948, and September of 1949? A. Yes.

Q. In what capacity were you employed during that period? A. As personnel manager.

Q. Do you know W. H. Townsend? [172]

(Testimony of Gordon V. McCuish.)

A. Yes, I do.

Q. Do you remember the first time you saw him?

A. Yes.

Q. Do you know about when that was?

A. About the middle of November as near as I can recall.

Q. In what year?           A. 1948.

Q. Where did you see him?

A. Mr. Townsend came into my office some time during the morning; I wouldn't say the time, and he came in and said, "I am Mr. W. H. Townsend, and I have sent an application, and I am here to apply for work."

Q. What did you say to him?

A. I told him that at the present time the plant was still under construction and we weren't employing anyone at this division at this time.

Q. What did he say?

A. He asked me if there was a possibility of getting work at one of our other divisions. I told him I would have to clear that with Mr. Stitt, our plant manager, and with Mr. Lindley, who had had correspondence with him prior to the day he called.

Q. How did you know that?

A. Being personnel manager, we have a file and record of the applications and supplements that is added to applications.

Q. Did you recall having seen an application from Mr. [173] Townsend?           A. Yes, I did.

Q. You recognized his name when he came in?

A. Yes, I did.



(Testimony of Gordon V. McCuish.)

Q. How long did you talk to him on this occasion?

A. Not too long; possibly 15 or 20 minutes. I was discussing mostly Mr. Townsend's trip to California with his family.

Q. He told you about that?

A. Yes, he did.

Q. Did he say how he had gotten to California?

A. Yes, he said he drove a car out from back east, from Alabama, and that he was delivering that to Ft. Mason within the next day or two, and I said——

Q. He told you that in the course of this conversation?

A. Yes, he did.

Q. Go ahead.

A. And he said that upon delivery of the car that he would be back and see if we could find something for him to do.

Q. What did you tell him?

A. We told him that we had been placing some of our men at the Antioch Division.

Mr. Garry: Excuse me one minute. He says "We." I haven't heard anybody but himself. Will you clarify that, please?

Q. (By Mr. Holmes): What do you mean?

A. By the way, I might mention that I had no authority to place [174] anyone at any division without first being instructed by the plant manager or one of the Superintendents in the plant.

Q. By "we" who are you referring to?

A. I am referring to Mr. Stitt and Mr. Lindley.

(Testimony of Gordon V. McCuish.)

Q. You are referring to the management of the plant? A. The management of the plant.

Q. Was anybody else present at this conversation?

A. Prior to that time, no. I had tried to contact Mr. Lindley. In due course of time he came walking down——

Q. While you were talking to Mr. Townsend?

A. While I was talking to Mr. Townsend. If I recall correctly, we asked our receptionist to call him on the phone and see if we couldn't have him come into the office to talk to Mr. Townsend.

Q. Did Mr. Lindley arrive during this conversation? A. In due time he did, yes.

Q. Anything else said in the conversation that you recall?

A. Not much more at that time other than introducing Mr. Townsend to Mr. Lindley. And, briefly, Mr. Townsend stating that he was here to work and he would like to have a job; that he had this car, and about those few comments Mr. Lindley said, "You come into my office," and he left and went into Mr. Lindley's office at that time.

Q. And the talk continued in Mr. Lindley's office?

A. From then on the talk continued in Mr. Lindley's office. [175]

Q. That was the end of your conversation with Mr. Townsend?

A. At that first meeting, yes.

(Testimony of Gordon V. McCuish.)

Q. When did you see or talk to Mr. Townsend again after that?

A. At a later date, which was possibly two or three days—it may have been a week; there was a little time elapsed—he made delivery of the car to Fort Townsend—to Ft. Mason.

Q. Just a minute. How did you know he had delivered the car?

A. Because he had told me.

Q. He came in the office again?

A. He came in the office and told me he had delivered the car.

Q. In this second conversation who was present when he came to see you in your office?

A. Only I when he first came in.

Q. The two of you?

A. Just the two of us.

Q. He told you he had delivered the car to Ft. Mason?

A. That is correct.

Q. Now continue; tell me that conversation with you, if you will, please.

A. There was very little conversation at that time. I again contacted Mr. Lindley and called him in, and Mr. Lindley came in and during the time the three of us were in the office Mr. Townsend had asked if we—if Mr. Lindley had been fortunate enough to secure him a position at one of the other mills, [176] preferably Antioch, if possible. Mr. Lindley had told him that he hadn't done so at the present time but he would start then to try and locate him at one of the other mills.



(Testimony of Gordon V. McCuish.)

I would like to go back on the first meeting, if I may, and state this: that Mr. Townsend came in and took his billfold out of his pocket and said "This is about all I have got." He had a few dollars left—a dollar and some cents. This time he came back and he said, "I have to go to work."

Q. You mean the second meeting?

A. The second meeting, he said, "I have to go to work; my funds are exhausted." So Mr. Lindley told him then that he had a number of applications; that he hadn't been on the job long enough to review all of them and that there was a necessary procedure which must be followed on each application. The procedure that was followed was not discussed in my presence.

Q. You heard him tell Mr. Townsend about the procedure, however?

A. I heard him say that we had a number of applications and that they must be processed before—

Q. Did this conversation between Lindley and Townsend continue outside of your presence?

A. That was about the extent of our conversation at that time.

Q. What happened?

A. Mr. Lindley and Mr. Townsend again went to Mr. Lindley's office. [177]

Q. Then they were outside of your hearing?

A. That's right.

Q. Is there anything else about this conversation up to the time they left you that you can recall?



(Testimony of Gordon V. McCuish.)

A. Not to my knowledge. It was very brief.

Q. About how long did you talk to Mr. Townsend, or were you in his presence?

A. On the second meeting?

Q. Yes.

A. Oh, ten or fifteen or twenty minutes, half an hour; I don't know; it wasn't very long. It wasn't too long. [178]

\* \* \*

Q. (By Mr. Holmes): When did you see Mr. Townsend again to talk to, Mr. McCuish, after this second interview that you have just related?

A. Periodically; quite often; I wouldn't begin to say how many times, just that it was often.

Q. Would you say where you saw him?

A. At the plant, on the streets of Antioch, and so forth.

Q. Did you ever talk to him about a job on those occasions?

A. Frequently Mr. Townsend would call by telephone or stop at the plant and ask when the mill was going to start, and that was about the extent of talking about the job part of it, as far as I was concerned.

Q. Did you ever talk to Mr. Townsend about a job in the paper mill in the plant?

A. Yes, I did. [179]

Q. Can you state when?

A. I would say on or about the middle of August, or thereabouts; maybe later or a little before.

(Testimony of Gordon V. McCuish.)

Q. Where did you talk to Mr. Townsend?

A. Mr. Fuller—may I go back just a minute?

Q. No; just answer the question.

A. Where did I talk to Mr. Townsend?

Q. Yes.           A. In my office.

Q. In your office?           A. Yes.

Q. Was anybody else there?

A. The girl, my secretary.

Q. And Mr. Townsend?

A. And Mr. Townsend.

Q. What was said in this conversation?

A. Mr. Townsend came into my office and said that Mr. Fuller had offered him a job as broke bailer, but that he wasn't going to take that job, and would we consider a Mr. Fisher. I told him my position was not to employ anyone without first the supervisor authorizing their employment, and told him that I couldn't employ Mr. Fisher or no other individual without the supervisor first authorizing his employment.

Q. Anything else said in that conversation?

A. To the best of my knowledge there was nothing other than [180] asking for Mr. Fisher and walking on out.

Q. Do you know where Mr. Townsend had been just prior to that conversation?

A. He had been out in the mill talking to Mr. Fuller.

\* \* \*

Q. (By Mr. Holmes): Had you talked to Mr.

(Testimony of Gordon V. McCuish.)

Townsend that day yourself prior to this conversation?      A. Yes, I had.

Q. How did you talk to him?

A. I talked to him shortly after one o'clock and told him that there was a vacancy in the mill, in the board mill, and Mr. Fuller wished to interview him for that position. Mr. Townsend left that building and went out and talked to Mr. Fuller.

Q. Then how long after that did you talk to him in this other conversation that you have related?

A. Half an hour or 45 minutes. [181]

\* \* \*

Cross-Examination

By Mr. Garry:

Q. Mr. McCuish, how long have you been with the Fibreboard Company?

A. September 16, 1948.

Q. September 16, 1948?      A. That's right.

Q. Are you still with them?      A. I am.

Q. Where did you come from before you took this job?

A. I was twelve years and some odd months superintendent of the Heidemont Canning Company at Antioch.

Q. Were you employed prior to the time that you went to work?

A. I was on leave of absence; I was traveling. I traveled.

Q. Mr. McCuish, you were fairly new to the procedure, to the personnel and the environs there

(Testimony of Gordon V. McCuish.)

at the time that you met Mr. Townsend for the first time; isn't that a fact?

A. I would say no; I had worked with personnel work for over 25 years.

Q. I mean in the Fibreboard Company; I am not talking about your personal experience. You were just new in that place yourself, isn't that the fact?

A. I came in there in September, '48, but I wasn't new to personnel work, I assure you.

Q. That isn't what I am asking you, sir. I am asking you if the work at Fibreboard, the personnel and the surroundings there [182] were all new to you; isn't that right?

A. No; I was taken to San Francisco and schooled on that for some time, and also at the Antioch Division and at the Stockton Division.

Q. When did you go to work for the Fibreboard Company, Mr. McCuish?

A. September 16, 1948.

Q. When did your schooling start with the Fibreboard Company? After September 16, 1948?

A. That's right.

Q. Where did you spend your first month?

A. Between San Francisco, the San Joaquin and Antioch and Stockton.

Q. You traveled most of the time, did you not, from one place to the other?

A. Well, I still spent eight hours, or approximately eight hours in the office with personnel training.



(Testimony of Gordon V. McCuish.)

Q. Every day?

A. Yes, practically every day.

Q. From September 16, 1948, isn't that right?

A. That's right.

Q. That's right? From that period on?

A. From that period on.

Q. You first met Mr. Townsend some time in the middle of November, isn't that right? [183]

A. That's right.

Q. You had been on the job about two months?

A. That's correct.

Q. Do you recall the day that you first saw Mr. Townsend? A. No, not the exact date.

Q. You said that you saw Mr. Townsend in the middle of August, did you say?

A. In the middle of November. I wasn't working——

Q. No; I am talking about now the period of time of 1949; I am sorry, Mr. McCuish.

A. It was during the month of August; it could have been the forepart of August.

Q. Or the latter part of August?

A. I don't recall distinctly.

Q. At any rate, it was the day that Mr. Townsend came over from another plant, isn't that right?

A. That is correct.

Q. To be interviewed by Mr. Fuller, was that it?

A. That's right.

Q. And Mr. Townsend told you about his brother-in-law, Mr. Fisher; do you remember that?

(Testimony of Gordon V. McCuish.)

A. I can't say that I am sure I knew Mr. Fisher was Mr. Townsend's brother-in-law.

Q. But he did mention a Mr. Fisher, did he not?

A. He mentioned a Mr. Fisher, yes. [184]

Q. Isn't it also a fact that Mr. Fuller that very day asked to have Mr. Fisher come down to the paper mill plant? [185]

\* \* \*

CLAUDE M. STITT

a witness called for defendant; sworn.

The Clerk: Would you state your name to the Court, please?

The Witness: Claude M. Stitt.

Direct Examination

By Mr. Holmes:

Q. Mr. Stitt, you are a resident of Antioch?

A. Yes, sir.

Q. Have you been for many years?

A. Yes, sir.

Q. You are employed by Fibreboard Products, Inc.?

A. Yes.

Q. And have been employed by them for many years?

A. Yes.

Q. You are still employed by them?

A. Yes.

Q. Between the month of September, 1948, and September, 1949, what was your position?

A. Plant manager of the San Joaquin Division, Fibreboard Products.

(Testimony of Claude M. Stitt.)

Q. Was that the new plant on the outskirts of the City of Antioch?      A. Yes, sir.

Q. Do you know the plaintiff here, Mr. W. H. Townsend?      A. Yes. [188]

Q. Do you recall when you first met Mr. Townsend?      A. Yes.

Q. Will you state what that occasion was, please?

A. I would judge it was about the middle of November, 1948, when I was introduced to him by Mr. McCuish, our personnel manager, in a sort of hallway.

Q. What was said on that occasion?

A. After the formal introduction, Mr. Townsend said "Mr. Claude, here I am, and I think I can do a good job for you."

Q. What did you say?

A. I told him, "Well, we would have to see about that, because at the present time we weren't engaging any hands other than supervisory staff members."

Q. What did Mr. Townsend say?

A. He said he would like to have a job because he was very low on finances.

Q. Did you reply to that?

A. I told him that would have to be cleared through the personnel department.

Q. Anything else said in that conversation?

A. Not as I recall.

Q. When did you next see Mr. Townsend to talk to him?

A. Oh, other than occasions saying "Hello"

(Testimony of Claude M. Stitt.)

when I may have seen him on the street or so, was when he had been sent out by the Antioch Division to the San Joaquin Division to help us [189] during an emergency that we had during the start up on what we term the No. 1 machine.

Q. When did that take place?

A. I would say that was about the forepart of August, 1949.

Q. You say Mr. Townsend was sent out there from the Antioch Division?

A. From the Antioch Division.

Q. Working in the San Joaquin Division temporarily?

A. Yes, because we had borrowed a few hands from them to help with an emergency. We had an emergency.

Q. Do you know about how long he was there?

A. As I recall it, about two weeks.

Q. Did you talk to him during that period?

A. Yes.

Q. Well, will you state where and when?

A. Well, other than just casually saying "Hello" and "Good morning," passing by, there is one specific occasion that I recall. He stated that he had been elected a delegate to the labor convention and that he was very proud of having been elected. And the other occasion that I recall that he asked me if——

Q. Was this other occasion when you talked to him during this same two weeks period?

A. Yes.



(Testimony of Claude M. Stitt.)

Q. Where did you talk to him on this second occasion? [190]

A. It was on what we would term the machine room main floor.

Q. What was said in this next conversation?

A. After the usual good morning and "How are you," he stated that he had heard that some of the employees had received transportation costs and reimbursement for what they had put out. He wanted to know if that was true. I told him "Yes," that was true.

Q. What did he say then?

A. And he asked, well, when he was to get his. My reply to that question was that as of the present time he had no basis to receive any because of two facts: One, he was not on the payroll of the San Joaquin Division; the second being that he had come out on his own from the east, and that we hadn't compensated any individual for that; it was only when we had made previous commitments to cover any transportation costs that we were reimbursing for it.

Q. Is that the first time that you had ever talked to Mr. Townsend about that particular matter?

A. That is the first and the only time.

Q. Was there anything else said in that conversation?

A. He stated that he had been doing different kinds of work and that he would like to get on as a steady employee of the San Joaquin Division.

Q. What did you tell him?

(Testimony of Claude M. Stitt.)

A. I told him that was a problem to be handled through the [191] personnel department.

Q. Anything else said in the conversation?

A. Not as I recall.

Q. When did you talk to Mr. Townsend again after that particular conversation?

A. As I recall, it was the first Saturday in September of 1949.

Q. And what was the occasion?

A. I had received a call from a Mr. Colter, Standing Committee Member of Local 249, International Brotherhood of Pulp, Sulphite and Paper Mill Workers at the Antioch Division asking if I could see him and Mr. Townsend that morning. I told him yes, and they came out, and Mr. Townsend, I could readily see, if I may use a slang expression, was somewhat "Hot under the collar"; and he stated he would like to get at the root of all the accusations that had been made and why he had been fired—he had not been given a job at the San Joaquin Division.

Q. Did he say where he had been fired?

A. He stated that he had been fired from both Divisions.

Q. What did you say to him?

A. I told him I couldn't answer relative to what had taken place at the Antioch Division, because that was a matter completely out of my hands; I didn't have any of the facts pertaining to it. I further told him that it was impossible for him to use the word about having been fired from the

(Testimony of Claude M. Stitt.)

San [192] Joaquin Division because he wasn't on the San Joaquin Division payroll.

He then stated well, in addition to being fired, as he insisted upon it, he had also not turned down a job—which I had asked him as to why he had turned the job down.

Q. You asked him why he had turned a job down?

A. Yes, because I had the report from our personnel department that he had refused the position of a baler man in the machine room, which he had been doing, or helping on it, during the period that we had borrowed him from the Antioch Division, and he said he hadn't turned that down, the reason being that he already had a job, and since he had a job it was impossible to turn down another one; and he made the accusation several times that he had been fired from a San Joaquin Division by Mr. Lindley, and I kept trying to tell him that that would be an impossibility, because he wasn't on the payroll of the San Joaquin Division. And he asked me then if I would call Mr. Lindley in and would settle the matter. I told him that I would not prefer to do that, because with the temper of the feeling at the time and also that Mr. Lindley, due to conditions prevailing in the pulp mill was quite busy that morning, but I would take it upon myself to investigate what had taken place prior to his reporting to me that he had been fired.

Q. What did Mr. Townsend say to that?

A. He said, well, if it was all that could be done



(Testimony of Claude M. Stitt.)

at the [193] time it would have to serve, and he thanked me for the hearing on that morning, and Mr. Colter and he left.

Q. Did Mr. Colter say anything all during this time? A. No.

Q. How long did the conversation take?

A. I would say about an hour or an hour and a quarter.

Q. Anything else said that you can remember?

A. Not specifically at that time.

Q. When did you talk to Mr. Townsend again after that?

A. Well, a Sunday near the middle of the month of September, 1949.

Q. Where did you talk to him?

A. At my home.

Q. Was that on a Sunday afternoon?

A. Yes.

Q. How long did Mr. Townsend spend with you that Sunday afternoon?

A. I would say it was practically all afternoon.

Q. And can you estimate the number of hours or minutes?

A. I would say roughly from about 1:00 until a little after 4:00—about 4:30.

Q. What was the subject of that conversation, or subjects, plural?

A. He had called earlier, wanted to know if I would see him. I told him yes, I would see him. So he came over. And first [194] of all he inquired as to the outcome of my promise to investigate this



(Testimony of Claude M. Stitt.)

as he termed being fired by a representative of the San Joaquin Division. I told him that I had investigated that, and Mr. Lindley had told me very explicitly that he hadn't told Mr. Townsend that he had been fired; that he had told Mr. Townsend that he hadn't counted on using him in his department—that is the pulp mill department—the reasons being that after investigation of his qualifications and suitability, he felt that, out of a number of applicants he had had, he had better men for the positions involved.

I also told him that I had talked to the late Mr. Fuller relative to the matter of him being offered a position by Mr. Fuller in what we would term the board mill department, and Mr. Fuller had stated that Mr. Townsend had refused to accept a job on the background that he had had a job over at the Antioch Division which was paying him more money, and since he had the job already, he would like to have Mr. Fuller take it up with the personnel department to see if a Mr. Fisher couldn't be given that position.

The next main topic of the conversation was Mr. Townsend offered a severe criticism of the officials of Local 240 International Brotherhood of Pulp, Sulphite and Paper Mill Workers. My reply to that was, well, if everything was true as to what he had been telling me, that maybe his criticism was just and maybe it wasn't just; but if he felt something was [195] wrong, he should take it up with the authorities of the Union involved and not

(Testimony of Claude M. Stitt.)

blame representatives of Fibreboard, or take up their time on it. He said that he would be carrying through on that matter.

And the rest of the afternoon was spent by Mr. Townsend outlining to me what he had did, giving evidence to show positions that he had held, various data that he had accumulated, different cards that he had had to show what he had been doing before that.

Q. You mean there were documents or papers that he showed you?

A. They were papers, cards, and so forth.

Q. How did he bring those? How were they carried?

A. He brought them over in a brief case.

Q. Did he physically show them to you on that afternoon?

A. Yes, he laid them out all over the floor.

Q. How long did that particular part of the discussion take?

A. I would say roughly about two hours.

Q. Was there anything else on this Sunday afternoon discussion that you can recall?

A. No, sir.

Q. You referred to Mr. Fuller as the "late Mr. Fuller," I believe. Will you state when he died?

A. Early in 1950, as I recall it.

Q. Did you have occasion to talk to Mr. Townsend again after [196] this Sunday afternoon?

A. Yes.

Q. Will you state approximately when?

(Testimony of Claude M. Stitt.)

A. As I recall, it was in October of 1949.

Q. Where?

A. He came out to the plant, and I think the first day that he came one of the officials of the concern was there, which I told Mr. Townsend I was tied up with and he said, "Well, I will be back tomorrow or the next day or so." And within the next day or so he came back, and after the usual "Hello" and "How are you" he asked if there was any reason why he could not be given a job at the San Joaquin Division. I told him as far as I was personally concerned at that time there wasn't any; but it must be borne in mind that he had already refused one position that had been offered to him, and that based on the criticism that had been referred to by Mr. Townsend, the Department heads would want to study very carefully before they would offer him one, and he said that was all right, he felt that they would work out all right.

Then he also asked if I would talk to Mr. McCuish to see if there was any reason—if the personnel department had anything that would bar him from seeking employment in the San Joaquin Division.

Q. How long did this conversation take?

A. I would say roughly about 20 minutes or half an hour. [197]

Q. And this was in your office?

A. Right.

Q. Did you have any other discussions with Mr. Townsend after that time?

A. Well, we would meet occasionally on the



(Testimony of Claude M. Stitt.)

street and say "Hello" and he would ask as to how things were going. He would tell me that he was still interested in getting a job at the San Joaquin Division.

Q. Did you ever tell Mr. Townsend that he was denied employment because of rumors?

A. No, sir.

Q. Or stories about him? A. No, sir.

Q. Among other things, when Mr. Townsend talked to you on this Sunday afternoon, did he mention he had been an organizer for the Pulp and Sulphite Paper Mill Workers Union?

A. Yes, sir, he did.

Q. Is there a collective bargaining agreement at this San Joaquin Division plant?

A. Yes.

Q. With what Union is that agreement?

A. It is with two unions. International Brotherhood of Pulp and Sulphite Paper Mill Workers, and International Brotherhood of Paper Makers.

Q. Is the International Brotherhood of Pulp and Sulphite [198] Paper Mill Workers the same union that Mr. Townsend told you he had been a representative of? A. Right.

Q. Do you know the approximate date when the first collective bargaining agreement was entered into at that plant?

A. As I recall, it was the forepart of July, 1949.

Q. Did you have some of your crew hired at that time?



(Testimony of Claude M. Stitt.)

A. Yes, as far as the No. 1 machine crew, the semi-chemical pulp mill crew, or the yard crew, the power plant, and most of the maintenance crew, and part of the hands for the recovery boiler crew, they were on the job.

Q. Was that a large portion?

A. I would say he had roughly 70 per cent or more of the total number of hands needed for the plant at that time.

Mr. Holmes: I think that is all.

The Court: You may cross-examine, Mr. Garry.

#### Cross-Examination

By Mr. Garry:

Q. Mr. Stitt, how long have you been with the Fibreboard Products Company?

A. Counting there and one of the other predecessor companies, ever since December of 1924.

Q. How long have you been in a supervisory or managerial capacity?

A. From December of 1927, in what we term—I was supervisor and manager of a department. In July of 1946, I took over the [199] managership of what we term the Antioch Division, or January 1st, that was, 1946.

Q. What are you doing at the present time?

A. I am Manager of what they term the Central Engineering Division.

Q. In Antioch?           A. Antioch.

Q. That includes both plants, does it?

(Testimony of Claude M. Stitt.)

A. That includes all the plants and subsidiaries of Fibreboard.

Q. Are you familiar with the ad that appeared in the various trade journals that Mr. Townsend saw?

A. I am familiar with the ad that appeared in one trade journal, and that was the Southern Pulp & Paper Manufacturer.

Q. Do you recall what was in that ad?

A. I don't recall the wording; I recall the gist of it.

Q. The gist of it is good enough.

A. It was to the effect that a pulp mill would be opening on the Pacific Coast at some approximate date, and parties interested should communicate with box certain number of the Southern Pulp & Paper Manufacturer.

Q. And in response to that ad—how long did you run that ad?

A. Two months, as I recall.

Q. Two different issues, isn't that right? [200]

A. Yes.

Q. How many people did you need at that time? A. I would say about 300.

Q. You needed 300 people. And these were more or less experienced people that you were asking for?

A. May I add to that? Because we hadn't—

Q. I don't want to cut you off.

A. Because we hadn't engaged anybody other than certain key supervisory staff at that time.

(Testimony of Claude M. Stitt.)

Q. You needed 300 people when you put the ad in there, isn't that right? A. Yes.

Q. You did receive a communication from Mr. Townsend, did you not? A. Yes, sir.

Q. And you replied to him on the first day of September, 1948? A. That's right.

Q. You replied to him yourself?

A. That's right.

Q. Were there any other communications from other paper and pulp mill men who corresponded with you at that time?

A. Along about that time or a little later we had a large number of them.

Q. I say about that time, say the first of September of 1948? A. Yes. [201]

Q. How much correspondence did you receive, do you recall, in reference to the ad that you had looking for paper and pulp mill men?

A. I don't recall the exact number, but there were quite a few.

Q. Would you say there were 10 or 20?

A. I would say there was nearer 70.

Q. About 70? And you had 300 openings for jobs, isn't that right?

A. At that time, roughly speaking.

Q. So when you wrote this letter to Mr. Townsend on the first day of September, 1948, you had openings for 300 men; isn't that correct?

A. That's right, because we hadn't made commitments to certain people who we had in mind making commitments to.

(Testimony of Claude M. Stitt.)

Q. You were quite anxious to get hold of men like Townsend, from what you had seen in his application?

A. May I answer the question in this way——

Q. Answer it in any way you like.

A. We were quite anxious to get the best qualified men we could to fill every position in the mill that was still vacant.

Q. On the first day of September when you wrote him the letter and with it returning his qualifications or the recommendations from the North Carolina Pulp Company, you were satisfied that a man like Townsend, from what you had seen so far, was someone that you wanted to pursue further; isn't that right? [202]

A. Yes, we were desirous of investigating him further.

Q. What did you do pursuant to that investigation?

A. The matter was turned over to the pulp mill superintendent, Mr. Lindley, and our personnel department, with instructions that they check the references, the background of what we would term his suitability from past record and to see if the statements made, as far as we could ascertain, in his application were correct.

Q. Mr. Stitt, when did you tell Mr. Lindley that?      A. On his arrival.

Q. On the first day of October, 1948?

A. No; I would say it may not have been the



(Testimony of Claude M. Stitt.)

first day, but I would say it was either that day or immediately afterwards.

Q. Did you make any particular comments on the Townsend application to Mr. Lindley?

A. Not any more than would pertain to any other application.

Q. At the time of October 1st how many openings did you have for the new pulp mill?

A. I can't answer the question because I don't know how many openings we had at that time that were still vacant.

Q. You did mention on direct examination that on or about July, 1949, you entered into a collective bargaining contract with the bargaining union; isn't that correct?      A. That is right.

Q. Now at that time you said you had filled your capacity to [203] the tune of about 70 per cent?      A. That's right.

Q. You still had openings for 30 per cent, isn't that correct?      A. Roughly that.

Q. How big a staff is there in that mill?

A. Slightly over 400, I would say.

Q. In other words, you had about 280 filled?

A. That's right.

\* \* \*

Q. Isn't it part of Mr. Lindley's duties to know how many men should be working in the mill, how many men he needs?

A. As superintendent, the answer is yes. [204]

\* \* \*

(Testimony of Claude M. Stitt.)

Mr. Garry: Did you ever bother, Mr. Stitt, to investigate yourself the references that Mr. Townsend sent to you?

A. Not until after we got in the turmoil with Mr. Townsend.

Q. What do you mean by "turmoil," sir?

A. After Mr. Townsend came out and made the accusations that Saturday morning, then I took it upon myself to make a thorough investigation.

Q. May I ask you the question, what Saturday morning?

A. I think it was the first Saturday of September, 1949.

Q. The first Saturday. Is this the accusation you are talking about where he came there with the Union representative?

A. That's right.

Q. That is the time that you, yourself made a complete investigation?

A. That's right.

Q. Up to that time you had made no investigation; is that right?

A. I personally hadn't. The matter had been referred to the personnel department, to the department heads.

Q. Who is Mr. Van Voorhis?

A. The plant engineer at the Antioch Division of Fibreboard.

Q. As I recall, Mr. Stitt, you said that in July your plant, the paper pulp mill, was filled to the capacity of 70 per cent; [205] that is correct, is it not?

(Testimony of Claude M. Stitt.)

A. I didn't specifically state the pulp mill; I said the plant requirements.

Q. The plant requirement was 70 per cent. What was the paper pulp mill requirement?

Mr. Holmes: That term was ambiguous and inaccurate, your Honor. There is no paper pulp mill; there is a paper mill and a pulp mill. I think that is clear from the evidence already.

The Court: I think he wants to know about the pulp mill. Is that what you want to know?

Mr. Garry: That is right.

A. I haven't records to state what the percentage was as far as the pulp mill is concerned.

Q. Were you filled to capacity in July, 1949?

A. I would say no, but I just stated now that I haven't the records to base a reply as to any estimate or percentage. All I can say, it was largely filled, but what the percentage was I couldn't say.

Q. You said that because of this interview you had with the business agent on the first Saturday in September that you, yourself, made an investigation?

A. May I make a correction? The interview wasn't with the business agent; the interview primarily was between Mr. Townsend and myself. A member of the standing committee sat [206] there without saying a word.

Q. He was there, was he not?

A. He was there.

Q. He was there in an official capacity, was he not, Mr. Stitt?

A. I presume that he was.



(Testimony of Claude M. Stitt.)

Q. You said that you personally made an investigation? A. That's right.

Q. And in your investigation did you find that there had been any check up of any of the references furnished by Mr. Townsend?

A. Yes, sir.

Q. What did you find? What check-ups had been made?

A. The one specifically that I recall that we had written to the parties that he had given as the reference, the Gulf States Paper Company.

Q. Yes.

A. And we had a report which was contrary to what Mr. Townsend had given us in connection with his experience with the Gulf States Paper Company.

Q. When was that inquiry made?

A. I don't recall any exact date; that was handled through the personnel department.

Q. As a matter of fact, this information was gotten after all this so-called turmoil you are talking about; isn't that a fact, [207] Mr. Stitt?

A. No, sir, not as far as I am concerned, because investigations will prove, as far as my investigation showed, that we had data on Mr. Townsend prior to this turmoil condition.

Q. It is your testimony, then, Mr. Stitt, that these so-called inquiries were made prior to the turmoil date?

A. I won't state that every one of them was, but I will state that they were made—that is at least



(Testimony of Claude M. Stitt.)

a part of them, prior to the time September 3, 1949.

Q. But you don't know when?

A. That's right, because I haven't the information available.

Q. Then how do you account for the fact that on September 2nd after the first Saturday that we are talking about you had one of your representatives send a letter to Mr. Townsend notifying him that he had turned down a job in your plant, in the paper mill plant—in the paper mill division?

A. I don't think your statement is correct that one of my representatives wrote a letter telling him that he had turned down a job.

Q. Isn't Mr. Van Voorhis a man under your jurisdiction?

A. No, sir; as I have said earlier in my testimony, he is the plant engineer at the Antioch Division. I have no direct supervision over Mr. Van Voorhis.

Q. None whatsoever?

A. None whatsoever. [208]

\* \* \*

Q. (By Mr. Garry): Did you or anyone under your jurisdiction pass on this information that Mr. Townsend had allegedly turned down a job on the 31st day of August, 1949, to Mr. Van Voorhis, or anyone else in the plant down there?

A. I personally wrote a letter to Mr. Sanford,

(Testimony of Claude M. Stitt.)

who was then manager of the Antioch Division which was to the effect that he had turned down a position which had been offered to him at the San Joaquin Division.

Q. You are the one that did that?

A. That is right. [209]

\* \* \*

Q. (By Mr. Garry): In the course of your investigation you found that Mr. Townsend at one time had organized a group of foremen in the paper industry, did you not? A. Yes, sir.

Q. And you also know that that case went to the National Labor Relations Board, do you not?

A. I have no knowledge of it.

Q. Your investigation didn't bring that out?

A. I had personally had no knowledge of it going to any National Labor Relations Board.

Q. Mr. Stitt, on the Sunday that you are now talking about, the Sunday that you said he spent four hours at your home, didn't you tell him that "Townsend, the trouble with you is that [210] you are too good a union man?"

A. I did not tell him that.

Q. You are sure you didn't tell him that?

A. Absolutely sure. I told him what I have stated earlier.

Q. Didn't you also tell him, Mr. Stitt, or try to tell him that the Union was trying to get your job? Didn't you tell him that? A. I did not.

Q. Didn't you in that four hour conference try

(Testimony of Claude M. Stitt.)

to get Mr. Townsend to file a suit against the Union?

Mr. Holmes: Your Honor, these matters I think are totally immaterial. Apparently counsel is trying to lay some foundation here for some controversy between the Company and the Union or the Plaintiff and the Union, or the Plaintiff and the Company, based on the National Labor Relations Act, which is totally immaterial.

Mr. Garry: I might add that I didn't bring up this question now, because they brought it up in his direct examination. He said he spent two hours discussing unionism. I didn't bring it up.

The Court: Let me say this: I think the line of questioning is material because it goes to the frame of mind of Mr. Stitt here who occupies a position of supervision in the plant, and he is the one who may or may not have had a part in entering into this contractual relationship and the termination of any [211] rights that Mr. Townsend may or may not have had.

Mr. Holmes: I submit, your Honor, Mr. Stitt's frame of mind in September after Mr. Townsend had been told he was not going to be employed is immaterial.

The Court: Well, the matter was still under consideration, and I think that you have to hear the whole story. Whatever Mr. Stitt's story is, I want to hear it.

Mr. Garry: If your Honor please, I might also add, bearing in mind this exhibit we have



(Testimony of Claude M. Stitt.)

offered, Exhibit No. 4, signed by Mr. Van Voorhis, Plant Manager, Antioch Division, who isn't even under this man.

Mr. Holmes: He is plant engineer, not Plant Manager.

Mr. Garry: Plant Engineer.

The Court: The point is I don't want to have the case argued now. I was a little bit in error when I spoke of his frame of mind. I am interested in what the fact is, what he told Mr. Townsend, and what Mr. Townsend told him. On this subject I am going to allow counsel to cross-examine on it. He apparently has knowledge of what occurred there, and I want to hear the story.

Mr. Garry: Now, Mr. Stitt, you say you had a conversation some time in the middle of August with Mr. Townsend when he was out there doing janitor work in your plant; is that right?

A. That's right.

Q. That is when you said that you had this emergency and you [212] had to have him. Do you recall having a conversation with him at that time in reference to transportation?

A. Yes, sir, I have so testified.

Q. Isn't it a fact that Mr. Townsend said to you, "Mr. Stitt, I have been waiting a long time for that recovery job. Now I have also been waiting a long time for my transportation fare; when do I get it?" and isn't it a fact that you told him just as soon as the recovery department opened up and he went to work there he would get his



(Testimony of Claude M. Stitt.)

transportation at that time? Isn't that the fact?

A. The answer to that is "No." I will repeat again, as far as I recall the conversation, Mr. Townsend stopped me and asked me if it was true that certain individuals had received compensation for their transportation, and I told him the answer to that was yes. And he said "When do I get mine?" And I told Mr. Townsend that under two contentions he was not entitled to any consideration for a transportation rebate because, in the first place, on that particular day he was not an employee of the San Joaquin Division, and that no commitment had been made to him and he had come out here on his own.

Q. Isn't it a custom for the Company to be paying the transportation of delegates to union conventions? A. No, sir. [213]

\* \* \*

The Court: Did you pay the expenses of a delegate to the convention?

A. The Company has never paid the expenses of any delegate to any convention.

Q. (By Mr. Garry): Then will you kindly, Mr. Stitt, go over the conversation you had with Mr. Townsend relative to the discussion of transportation?

A. He stopped me on what we term the machine room floor and propounded the question to me, "Is it true that certain individuals have received compensation for what they have been out relative to transportation costs?" I told him "Yes." He

(Testimony of Claude M. Stitt.)

said, "When am I going to get mine?" I told Mr. Townsend he wasn't entitled to compensation because of two facts, one being that he was not as of that date an employee of the [214] San Joaquin Division; the second being that he had come out here on his own and we had made no commitment to him relative to compensating him for his transportation costs.

Q. On the date August 14, 1949, Mr. Stitt, how did you know whether you had made any commitments to him or not when you have already testified that you didn't go into all this record until after the turmoil started some time in September?

A. Because when Mr. Townsend showed up I asked our personnel man and Mr. Lindley if they had made any commitments to him. The answer to that was "No" by both parties.

Q. When did you ask him that, Mr. Stitt?

A. The day that I was first introduced to Mr. Townsend.

Q. What day was that?

A. I would say that was about the middle of November of 1948.

Q. I call your attention to a letter dated October 19, 1948, signed by Mr. Lindley addressed to Mr. Townsend and ask you if you had ever seen that before the date August 14, 1949?

A. I have seen a copy of it.

Q. You saw that before August 14, 1949?

A. Yes, a copy of that.

Q. What day did you see it, sir?

(Testimony of Claude M. Stitt.)

A. The day after it was mailed out. I saw the copy the day after it was mailed out. [215]

\* \* \*

Q. If you saw it the very next day after it was sent out, why did it take you so long to answer the question if you had seen it before August 14, 1949?

A. Because I wasn't sure as to whether you stated 1948 or 1949; that is why I was thinking as to whether to answer right off hand, as to whether I had heard correctly '48 or '49.

Q. Mr. Stitt, there wouldn't be any object in my saying August, 1948, because you didn't hear of this man in August, 1948, did you?

Mr. Holmes: Your Honor, I don't think argument with the witness is proper.

The Court: That is argument.

Mr. Garry: During this period of your advertising in this trade journal, Mr. Stitt, how many people did you contact and employ in your pulp mill? [216]

\* \* \*

The Court: The number of people that they hired and employed during that time is immaterial; but I am concerned, too, or I do want to know what response he got from that advertisement. Like undoubtedly Mr. Townsend answered in response to that, did you have many others that you know of?

Mr. Garry: He has already testified, if your Honor please, he got about 70.



(Testimony of Claude M. Stitt.)

The Court: Is that correct?

A. Yes, we got a very good response.

\* \* \*

Q. (By Mr. Garry): How many of those 70 men did you hire, Mr. Stitt?

A. I haven't any data on hand to tell you the exact number.

Q. Did you pay the transportation costs of those other men who came there?

Mr. Holmes: Your Honor, it is immaterial whether they paid transportation costs of anybody else, which would necessarily depend upon the arrangement with those other people.

The Court: If there were others.

Mr. Holmes: I think if he is going to go into that, we may have to go into every employment for all those people.

The Court: I know it opens a wide field, but I think he is entitled to go into the policy they followed. Mr. Stitt [217] has testified that they paid some transportation expenses. What transportation expenses they paid, what policy they followed on it, I think is a proper subject of examination. Answer the question.

Will you read it to him, Mr. Reporter.

\* \* \*

The Court: You are referring to the 70 or approximately 70 people that he said responded to the advertisement; isn't that correct, Mr. Garry?

Mr. Garry: That is right, sir.

A. The answer to that is "No; we didn't pay



(Testimony of Claude M. Stitt.)

the transportation of everybody that answered the ad.”

The Court: Did you pay it to anyone that you know of?

The Witness: I would say “yes” to that, because we had established a policy that parties in certain key positions who we made commitments to, it was understood before they left that we would compensate them for their transportation.

The Court: In other words, in some cases you had commitments for transportation?

The Witness: Yes, that was all definitely understood before the parties left their homes and moved up here.

The Court: Any further questions?

Q. (By Mr. Garry): How was this understanding arrived at? [218]

A. In some cases the parties had come out there on their own and made the personal contact with us; others through parties that we knew in certain instances, who we had asked for information as to qualifications, physically, so on and so forth. These we had received information on, how we were getting most of it by correspondence. In those other cases we had commitments before they left.

Q. In other words, these other men that you brought down here were done by correspondence also, isn't that right?

A. Either that or personal contact with us.

Q. Did you by any chance bring these people—

(Testimony of Claude M. Stitt.)

let us take one particular case of a person that you hired from without the State of California and paid his transportation down here, and let us follow the procedure for just a minute. Do you recall such a case?      A. Yes.

Q. You have that particular person in mind. Did you have him examined physically before you brought him down to California?

A. No, we had an understanding with him that he came subject to the passing of the physical examination; if he didn't pass the physical examination it was his risk.

Q. In other words, then he would have to go back?      A. That's right.

Q. Did you also check up on his qualifications before he came [219] down?

A. I have already answered "yes" to that. I will answer it again, yes.

Q. I am somewhat interested, Mr. Stitt, because I am trying to find out what happened in the case of Mr. Townsend. You received a letter and so on. You put your ad in sometime in June or July, isn't that right, of 1948?      A. That's right.

Q. And you received about 70 inquiries, isn't that right?      A. That's right.

Q. And Mr. Townsend happens to be one of them?      A. Yes, sir.

Q. That inquired and sent you communications. Now his communication was sent to you on the 26th day of August. On the first day of September, 1948, you sent to him a letter signed by yourself

(Testimony of Claude M. Stitt.)

returning his original reference that he had sent to you and you also asked him to sign an application blank, isn't that correct?

A. That is right.

Q. Which came to you about the 7th or 8th day of September, isn't that correct?

A. That is right.

Q. What I am trying to find out—Mr. Townsend didn't get down to Antioch until the 15th day of November, 1948. What I am trying to find out, how long does it take you to investigate [220] an application before he comes down to Antioch to go to work for your firm?

A. It depends upon the circumstances and what we find out.

Q. I don't quite understand that answer. Will you explain it a little bit more?

A. When I say "upon the circumstances," we may get a report which is contrary to another report; then we will try to get a third party who may not have been given to us by the party involved, by writing back to somebody in that area who has a mill, asking them if they know of anybody who was in the employ of the Company, when said Mr. "X" was employed by that concern, and they in turn give us their report.

Q. Mr. Stitt, in your experience you have handled thousands of men and you have had experience in leadership?

A. I have handled what?

Q. You have got experience in leadership, ex-



(Testimony of Claude M. Stitt.)

perience in managing men and also bringing in new employees into a firm, haven't you?

A. That's right.

Q. You took time, as busy as you are, Mr. Stitt, to answer an inquiry put by a man in Tuscaloosa, Alabama in a letter dated September 1st and also took time to have his recommendation that he had sent you from this pulp mill copied and you sent the original back. You also told this man, Mr. Stitt, that "Mr. Lindley will be on the job about the first day of October and [221] he will get in touch with you." I take it you had also taken opportunity to write to this firm that sent you the reference, because I also presume from your experience in the industry that you are familiar with this company that you had the recommendation from; isn't that correct?

A. Well, I didn't write to the concern, and I might explain to you why I personally answered the letter. When that inquiry came in I didn't have a personnel manager at the San Joaquin Division. The staff consisted primarily of about three or four parties. We had been engaged prior to that time in engaging supervisory staff members, and when Mr. Townsend came into the picture there had not been any commitments made to any individual and there wasn't for some time, to wage earners, relative to transportation. And the reason I personally answered the letter first was because I did not have a personnel manager; we weren't in a position at that time to develop



(Testimony of Claude M. Stitt.)

the thing. The personnel manager came in shortly afterwards, Mr. McCuish, the personnel manager, and Mr. Lindley were then instructed, along with the other key supervisory members, on matters of policy, on how to handle bringing in new employees. Then after we got our supervisory staff there the question was then settled who was to receive—what positions were to receive compensation for traveling.

Q. Now, Mr. Stitt, you have already testified that on the 20th day of October, 1948, you saw the letter that Mr. Stitt [222] had written the day after—

A. There is something wrong there.

The Court: You mean Mr. Lindley, don't you?

Mr. Garry: Mr. Lindley; I am sorry—that letter that had been written by Mr. Lindley to Mr. Townsend dated the 19th day of October, 1948, you saw it on the day after, the 20th; that letter also referred to the telephonic communication on the afternoon before.

The Court: You mean the telephone conversation? Is that what you mean? You said telephonic communication.

Mr. Garry: Yes.

Mr. Holmes: That letter speaks for itself; it is in evidence; rehearing it here doesn't make any difference.

The Court: No; he just wants to know if that is not a correct resume of the facts.

Mr. Garry: That is right.

(Testimony of Claude M. Stitt.)

The Court: It is preliminary to another question.

Q. (By Mr. Garry): Isn't that a correct resume of the facts according to your understanding? A. That's right.

Q. Did you ask Mr. Lindley at that time if he had personally checked up or had done anything to check up the references for Mr. Townsend?

A. I didn't ask him the question, because in my position as manager of the plant I saw copies of all correspondence that [223] went out. I had seen no copy of any correspondence going out relative to the party involved. When I received copies I asked Mr. Lindley if during his phone conversation any commitment had been made. The answer to that was "No," because he said, "Based on your instructions and the policy that we have been instructed at our morning meetings, we were not to make any commitment to anyone, neither were we to make any commitment until such time as we personally investigated all of the references and qualifications of the person involved."

Q. Was it because you read the letter of October 19, 1948, that prompted you to ask Mr. Lindley that question?

A. Yes, because this was the first batch of correspondence that I had seen on it.

Q. You also know that the man working for you, Mr. Lindley, had never been in a supervisory capacity before; you also knew that, didn't you?

A. That is not correct, because the record will

(Testimony of Claude M. Stitt.)

show that he had been in a supervisorial capacity at the St. Regis Paper Company. [224]

\* \* \*

Redirect Examination

By Mr. Holmes:

Q. Mr. Stitt, how many trade journals carried this ad for applicants for work?

\* \* \*

A. One.

Q. (By Mr. Holmes): Was that the Southern Pulp & Paper Manufacturer? A. Right.

Q. When you said you needed about 300 men were you referring to any particular department, or the whole plant, or just what were you referring to? A. Referring to the plant as a whole.

Q. How many men were needed in the pulp mill?

A. As to that particular department I have no figures that I can recall, as to just how many vacancies we had in the pulp [225] mill.

Q. How many were eventually employed in the pulp mill, that is, up to the time you started in regular operations?

A. The question would imply how many men are in the pulp mill now.

Q. How many men did you employ at this time it started its regular operations?

A. I will have to do a little figuring, because I don't recall the exact figure.

(Testimony of Claude M. Stitt.)

Q. Can you figure it quickly?

A. I can tell you roughly. [226]

\* \* \*

The Witness: In round numbers, a rough figure would be 70.

Mr. Garry: May I ask what the question [227] was?

\* \* \*

Q. (By Mr. Holmes): How many departments are there in that mill, Mr. Stitt?

A. There are the following main departments: Pulp mill, board mill, wood mill, maintenance and power, and there is the office.

Q. Is there a department head over each of those departments? A. That's right.

Q. Who is the department head over the pulp mill? A. Mr. Lindley.

Q. Mr. Stitt, in October or November of 1948, what was your expectation as to the opening date of the mill?

A. We had hoped to get started the late spring of 1949.

Q. Did you know definitely when it would open?

A. No.

Q. Mr. Stitt, I am going to show you two letters here, one of them on the letterhead of Fibre-Board Products, Inc., dated March 11, 1949, and another on the letterhead of the Gulf States Paper Corporation, Tuscaloosa, Alabama, dated May 23, 1949, and ask you if you have seen those two letters before? A. Yes, I have.



(Testimony of Claude M. Stitt.)

Q. There is a stamp in blue letters on each of these letters, "May 27, 1949, C.M.S."; "March 21, 1949, C.M.S."—what does that signify? [228]

A. It signifies that I have seen the copies of the letters then and passed them on to either the file or the party involved for further consideration on the facts at hand.

Q. Are those your initials, "C.M.S."?

A. That's right.

Q. You regularly stamp letters in that fashion that come to your hands? A. That's right.

Q. And this letter dated March 11, 1949, do you know whether that was sent out by Fibreboard Products, Inc.?

A. We have every reason to believe that it was because of the similarity in signatures.

Q. Isn't McCuish's signature on it?

A. That's right.

Q. Is that his signature? A. That's right.

Q. And this letter of May 23, 1949, addressed to Fibreboard Products, Inc., that was received by the Company? A. Yes. [229]

\* \* \*

Q. (By Mr. Holmes): During the period between October of 1948—make it September, 1948—and September, 1949, was there an investigation made as to Mr. Townsend's qualifications and background? A. Yes, there was.

Q. And would you state the general nature of that investigation, how you went about it?

A. Letters were sent to parties that he had

(Testimony of Claude M. Stitt.)

given as references. Letters were sent to different companies that he had worked for. And after the receipt of their reply, since there was a conflict, we wrote additional letters as to some of the replies we got to parties that some of our staff members either knew, or some that we didn't know, inquiring as to the [232] background of Mr. Townsend.

Q. Did this cover a considerable period of time?

A. It did.

\* \* \*

Q. One other question about this Exhibit E for identification: Is this a letter from Fibreboard and also a reply to Fibreboard?

A. It is.

\* \* \*

#### Recross-Examination

By Mr. Garry:

Q. Did you receive any other correspondence besides this one from the Gulf States Paper Corporation, Mr. Stitt?

A. Yes, sir.

Q. Relative to Mr. Townsend's employment?

A. Yes, sir. [233]

Q. Where are they?

A. At this particular moment, I don't know.

\* \* \*

Q. (By Mr. Garry): Who else have you written to, Mr. Stitt?

A. I don't recall all the other names that are involved at this time.

Q. Did you ever call the contents of this docu-

(Testimony of Claude M. Stitt.)

ment to the attention of Mr. Townsend?

A. Did I personally?

Q. Yes.           A. No, sir.

Q. Did you ever have any of your subordinates do so?

A. I understand from rumor that Mr. Lindley told me that he did.

Q. Isn't it a matter of fact that Mr. Lindley told you that Mr. Fisher and Mr. Townsend came up to his house some time in February and Mr. Townsend told him the circumstances involved in that particular letter—told him himself?

A. I haven't any knowledge or any recollection of Mr. Lindley telling me of any such event taking place.

Q. You were in the court room yesterday throughout the day, [234] were you not?

A. Yes, sir.

Q. You heard Mr. Townsend testify to what he told Mr. Lindley in reference to the fight he had with this man?

A. Yes, sir, but I don't recall any testimony that he went out to Mr. Lindley's house and told him that.

\* \* \*

Q. (By Mr. Garry): Then, Mr. Stitt, you knew a long time prior to this so-called "turmoil" that you are testifying to, what was in the recommendation from the Gulf States Paper Mill—whatever their name is?

\* \* \*

(Testimony of Claude M. Stitt.)

A. Yes, sir.

Q. (By Mr. Garry): When you testified earlier this afternoon when I asked you the question when you made an investigation of Mr. Townsend's qualifications, you didn't mention that you already knew.

A. I stand by what I stated at the time: That one part of the evidence involved relative to an individual is not convincing enough to make a final judgment as to his qualifications for a [235] position. [236]

\* \* \*

Q. (By Mr. Garry): Mr. Stitt, there was nothing in this letter from the Gulf States Paper Corporation that led you to decide not to hire Mr. Townsend, was there?

A. I think the very best evidence in answer to the question is to tell you that he was offered employment after that letter was received by the San Joaquin Division, by the San Joaquin [237] Division.

Mr. Holmes: Under your jurisdiction?

A. I, as manager of the plant, in one division. The policy of the plant was if one department head turned an individual down, that did not bar him from working for the Division.

\* \* \*

The Clerk: Defendant's Exhibits E and F in evidence.



No. 29449  
Exhibit No. 1  
Filed OCT 12 1950

FIBREBOARD PRODUCTS INC. C. W. Calhoun, Clerk

By Louis McQuinn  
Deputy Clerk



March 11, 1949

Personnel Manager  
Gulf States Paper Corp.  
Tuscaloosa, Alabama

San Joaquin Division  
Antioch, California

SAN JOAQUIN DIVISION

S.S.NO. 422-03-9553

Mr. W. H. Townsend is being considered for employment. Will you kindly fill out the form on the bottom of this letter and return it at your earliest convenience. Any information which you give us on this person will be appreciated and held strictly confidential.

Yours very truly,  
FIBREBOARD PRODUCTS INC.  
San Joaquin Division

Louis McQuinn  
Personnel Department

Name of Applicant: Mr. W. H. Townsend, S.S.No. 422-03-9553  
Present Address: Antioch, California

Would you consider this applicant for position of Recovery Room  
No ? Please check as to your viewpoints on items below:

	Good	Average	Poor
Character.....	<u>—</u>	<u>—</u>	<u>✓</u>
Ability.....	<u>✓</u>	<u>—</u>	<u>—</u>
Ability to get along with fellow workers	<u>—</u>	<u>—</u>	<u>✓</u>
Standing in the community.....	<u>As not known</u>	<u>—</u>	<u>—</u>
Financial Status:			
(a) Credit standing	<u>?</u>	<u>—</u>	<u>—</u>
(b) Does he own his own car?	<u>Yes</u>	<u>No</u>	<u>—</u>
(c) Does he own his own home?	<u>Yes</u>	<u>No</u>	<u>—</u>

Has he ever participated in community activities? ? If so, explain nature.

Additional Remarks: THIS MAN WORKED FOR THIS COMPANY FROM 3-26-49 TO 7-23-51 IN OUR RECOVERY ROOM. HIS LAST JOB WAS EXPANSION OPERATION. HE WAS DISCHARGED FOR SIGHTING ON THE JOB BUT HIS WORK ABILITY WAS GOOD.

Date: 3-16-49 J. McQuinn  
Signature

NOTE: SELF-ADDRESSED STAMPED ENVELOPE ATTACHED.

THE ABOVE INFORMATION WAS OBTAINED FROM HIS PERSONNEL RECORD AS THE MAN THAT SUPERVISED HIS WORK AND NO LONGER HERE



(Testimony of Claude M. Stitt.)

DEFENDANT'S EXHIBIT F

Gulf States Paper Corporation  
Tuscaloosa, Alabama

May 23, 1949.

Fibreboard Products, Inc.,  
San Joaquin Division,  
P. O. Box CC,  
Antioch, California.

Attention: Mr. T. M. Lindley,  
Pulp Mill Superintendent.

Gentlemen:

We have your letter of May 16, 1949, in regard to a W. H. Townsend, S. S. 422-03-9553. At the time Mr. Townsend left our employ he did not have a Social Security Number, but the information given in this letter covers a Willie Hugh Townsend.

Mr. Townsend was employed by this Company from March 22, 1929, to July 23, 1935. During his period of employment, he served as water tender on our Recovery Plant boilers. He also served as liquor runner, Evaporator Operator and Concentrator Operator and his services on these jobs were entirely satisfactory as an operator.

His services were terminated because of a definite rule which we have in effect relative to fighting on company property. Townsend was involved in the

(Testimony of Claude M. Stitt.)

breaking of this rule and was, therefore, discharged.

Very truly yours,

GULF STATES PAPER  
CORPORATION,

By /s/ J. M. ARMSTRONG, JR.,  
Plant Personnel Director.

JMA:Jr:dmw

Received May 27, 1949.

[Endorsed]: Filed October 12, 1950.

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The Court: Deemed read into evidence. They are part of the evidence. You will stipulate that they may be deemed read into evidence?

\* \* \*

Q. (By Mr. Garry): In this letter that you had Mr. McCuish send out to the personnel manager of the Gulf States Paper [238] Corporation, Tuscaloosa, Alabama, you set forth in there what this man's character was, ability, ability to get along with fellow workers, standing in community, financial status: (a) Credit standing, (b) Does he own his own car? (c) Does he own his own home? Has he ever participated in community activities? If so, explain nature. Then "Additional Remarks." And I presume that you read the additional remarks in this case, did you not, Mr. Stitt?

A. I did.



(Testimony of Claude M. Stitt.)

Q. You are familiar with them now. Would you like to see them? (Handing document to witness.) "Additional Remarks: This man worked for this company from 3-22-29 to 7-23-35, in our recovery plant. His last job was"—

Mr. Holmes: "Evaporator" I think.

Mr. Garry: ——"evaporator operator. He was discharged for fighting on the job but his work ability was good." You read that? A. Yes.

\* \* \*

Q. (By Mr. Garry): You had found by this time, Mr. Stitt, [239] that Mr. Townsend was a qualified recovery man in a pulp mill, had you not?

Mr. Holmes: That question is ambiguous. By what time?

Mr. Garry: By the time of August 31, 1949.

A. I can't answer your question directly, because in my position I was not a party to pass on the qualifications and the recovery department. The recovery department has board machines, wood mill operator, and whatever it might be. That was up to the superintendent of the department, part of his responsibility to pass on the qualifications of an individual involved.

Q. Was Mr. Fuller working under your directions, Mr. Stitt?

A. The same as any other department head supervisor.

Q. Who was Mr. Fuller's immediate superior?

A. Myself.

(Testimony of Claude M. Stitt.)

Q. Was it under your direction that Mr. Townsend was offered a job by Mr. Fuller in the paper mill department?           A. No.

Q. By whose direction was it, sir?

A. It wasn't anybody's direction that I know of, because as I was saying, an applicant, after one department head had not seen fit to engage him because in his estimation of lack of qualifications, the application that was still on file was turned over to another department head.

Q. Did you tell that to Mr. Fuller [240] yourself?

A. No; that was the policy through our personnel department established months and months prior to the date there.

Q. And yet, Mr. Stitt, something that you say that you had nothing to do with, how did you hear, prior to the time that Mr. Van Voorhis wrote the letter of September 2nd, to Mr. Townsend, then how did you hear that Mr. Townsend had been interviewed by Mr. Fuller on August 31, 1949?

A. It was reported to me in the personnel department, namely Mr. McCuish, that a position had been offered to Mr. Townsend, I think it was on a Wednesday the latter part of August, and that he had seen fit to turn it down.

Q. When did he tell you that, sir?

A. Oh, I think it was on the following Thursday.

Q. On the following Thursday?

A. After the Wednesday of the interview.

Q. On the following day?           A. Yes.

(Testimony of Claude M. Stitt.)

Q. Then did you immediately contact Mr. Van Voorhis at the other plant—I don't know what you call the other plant——

Mr. Holmes: Antioch Division, I think the record shows.

Q. (By Mr. Garry): Antioch Division plant. Did you call that plant immediately yourself?

A. No, sir, I had no contact with that plant at all.

Q. I thought you testified earlier that you told Mr. Van Voorhis that Mr. Townsend had turned down a job on August 31st? [241]

\* \* \*

The Court: Who did you notify, if anyone?

A. I wrote a letter to the plant manager, Mr. Sanford.

\* \* \*

Q. (By Mr. Garry): When did you do that? That is what I am trying to find out?

A. I think it was on the Thursday after this Wednesday, which would be probably the last Thursday in August.

Q. What was your interest in writing that letter, Mr. Stitt?

A. The reason the letter was written, because I had a telephone call from Mr. Sanford asking as to whether we had any further need for Mr. Townsend's services. The letter speaks for itself. It is to the effect that Mr. Townsend had been offered a position [242] and he had seen fit to turn it down

(Testimony of Claude M. Stitt.)

and at that particular moment they could do what they wanted with him.

\* \* \*

Mr. Holmes: Your Honor, there is this matter of the interrogatories, questions propounded both by counsel for the defendant and counsel for the plaintiff, to Mr. Utley.

The Court: I have read them.

Mr. Holmes: And there is a stipulation signed by the parties pursuant to which the interrogatories were submitted to Mr. Utley. I want to offer the stipulation and the questions on both direct and cross-examination, and the answers on both direct and cross-examination in evidence at this time.

The Court: Is there any objection to that, Mr. Garry? [243]

Mr. Garry: No objection, your Honor.

The Court: All right; the stipulation and the interrogatories both on direct and cross-examination——

Mr. Holmes: And the answers.

The Court: ——and the answers will be admitted into evidence and are deemed read into the record.

\* \* \*



W. H. TOWNSEND

the plaintiff, recalled in rebuttal. [244]

\* \* \*

Direct Examination

By Mr. Garry:

Q. Mr. Townsend, do you recall visiting Mr. Lindley at his home?

A. Yes, I visited him at his home one time. That was on February 8, 1949, and that is the only time I have ever been to Mr. Lindley's home. That was in the presence of Mr. Carl R. Fisher, who is now working as a boilermaker for the Southern Pacific Railroad at Gerber, California. In the presence of Mr. Fisher I had a conversation with Mr. Lindley.

\* \* \*

Q. (By Mr. Garry): What conversation did you have with him?

A. I asked him to give Mr. Fisher a job as first helper on the recovery boiler; told him that Fisher had worked at Tuscaloosa for the North Carolina Pulp Company and had been carrying a card as a boilermaker since 1918, and he was a union [245] boilermaker and a good man, he was my brother-in-law.

Q. Did you discuss anything else with him?

A. Mr. Lindley asked me at that time why I left the Gulf States Paper Company, and I told him the same as I have told the Court here in the early part of the testimony; a man told me to kiss his ass one day, and I told him that where I

(Testimony of W. H. Townsend.)

come from people didn't tell other people that, and I knocked him down. Then I called Charlie Barlow (?) who at the present time is superintendent at the Gulf States Paper Company.

Q. Did you tell him all this?

A. I told Mr. Lindley that. I told Mr. Lindley——

Q. Go ahead.

A. Mr. Lindley said "Under the same conditions I would probably do the same if a man had told me to kiss his ass." I said, "As soon as I knocked him down, I knew the policy of the Company was to fire anybody for fighting, so I immediately picked up the telephone and I called Charlie Barlow (?) and said I had knocked the man down." He said, "How about staying until the end of the day?" I said "O. K." I went ahead and worked until 2:00 o'clock. At that time we were working six hours a day.

Q. Had you been working for the Antioch Division right up to that time?

A. September 2nd.

Q. And who did you work under there? [246]

A. I worked under Mr. Walcott was the Master Mechanic and Mr. Van Voorhis was the plant engineer I worked under. He was my big boss, Mr. Van Voorhis.

Q. You worked under him, did you not?

A. Yes, sir, from the 22nd day of November, 1948, until the 2nd day of September, 1949.

(Testimony of W. H. Townsend.)

Q. (By Mr. Garry): When did you go to work when you got to Antioch?

A. I arrived here on a Monday night and I went to work on Tuesday of the next week, to the best of my recollection, either the 22nd or 23rd of November, 1948, for the Antioch plant.

Q. What date was the election of the Union delegate to the [247] conference up north?

A. August 3rd.

\* \* \*

Q. (By Mr. Garry): When is the first time that you ever had anyone tell you that you weren't going to be hired in the pulp mill?

A. On Sunday, August 28, 1949, I was told by Mr. Lindley in the personnel manager's office, Mr. McCuish's office—— [248]

\* \* \*

Q. (By Mr. Garry): That was the first and only time? A. That's right.

Q. That was the first time you had ever had anybody tell you that your application would not be considered, is that right?

A. That is the only time I was told at the San Joaquin. I was notified September 2nd then that I had no job at the Antioch mill.

Q. You were let out there too?

A. That's right.

Q. And in this conversation you had with Mr. Stitt on August 14, 1949, with reference to transportation—will you give that to us again?

A. I was sweeping out in the paper mill that



(Testimony of W. H. Townsend.)

day, I was sweeping in the machine room, and talking to Mr. Stitt. I told Mr. Stitt, I says, "This is August 14th. I came out here the 15th of last November." I told Mr. Stitt that I had come there at Antioch the 15th of November, 1948, and I said, "Now it is the 14th of August." I said, "I am a man of 20 years experience"—I was pushing a broom—"I was general foreman in charge of production for a few years." I said, "I am willing to push a broom." I says, "I will shovel crap; I am a man that will do anything that you want, but," I says, "I would like to know when I am going to get transportation, because some of these boys have gotten their money." I says, "I have been told that." He says, "You can't get your money [249] because you never went to work for the San Joaquin Division." He says, "You are working for the Antioch Division; we don't have any jurisdiction there." I says, "Yes, sir." He says, "It will only be a little while until you are an operator in the recovery room over here. Whenever you start on the Company's pay roll at the San Joaquin Division, then we will give you transportation from Tuscaloosa, Alabama, to Antioch."

Mr. Garry: No further questions.

### Cross-Examination

By Mr. Holmes:

Q. Did he say what transportation he would pay?



(Testimony of W. H. Townsend.)

A. He said he would pay my transportation expense from Tuscaloosa, Alabama, to Antioch; there was no commitment for any certain amount or anything; he just said my transportation would be paid for me and my family.

\* \* \*

[Endorsed]: Filed August 3, 1951. [250]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Complaint filed in the Superior Court.

Petition for removal.

Notice of filing petition for removal.

First amended complaint.

Interrogatories propounded by defendant.

Answers to interrogatories propounded by defendant.

First amended answer.

Stipulation and deposition of E. R. Utley.

Order for judgment.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Statement of points on which appellant intends to rely on appeal.

Designation of portions of record to be contained in record on appeal.

Reporter's transcript (October 11, 12, 1950).

Plaintiff's exhibits 1 to 7.

Defendant's exhibits A to F.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 23rd day of October, 1951.

C. W. CALBREATH,

Clerk;

By /s/ D. M. TAYLOR,

Deputy Clerk.

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[Endorsed]: No. 13141. United States Court of Appeals for the Ninth Circuit. Fibreboard Products, Inc., a Corporation, Appellant, vs. W. H. Townsend, Appellee. Transcript of Record. Appeal from the United States District Court, for the Northern District of California, Southern Division.

Filed October 23, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13141

W. H. TOWNSEND,

Plaintiff,

vs.

FIBREBOARD PRODUCTS, INC., FIRST DOE,  
SECOND DOE, and DOE CORPORATION,

Defendants.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT FIBREBOARD PRODUCTS,  
INC., INTENDS TO RELY ON APPEAL

Appellant Fibreboard intends to rely upon the following points:

1. The District Court erred in entering judgment for plaintiff against defendant Fibreboard.

2. The District Court erred in failing to enter a judgment dismissing defendant's complaint and awarding costs to defendant Fibreboard.

3. The District Court erred in holding that plaintiff and defendant Fibreboard entered a written contract.

4. The District Court erred in holding that plaintiff and defendant Fibreboard entered an oral contract.

5. The District Court erred in holding that

plaintiff and defendant Fibreboard entered an oral and written contract.

6. The District Court erred in failing to hold that no legally cognizable contractual relationship for permanent employment exists or existed between plaintiff and defendant Fibreboard due to vagueness and uncertainty.

7. The District Court erred in failing to hold that no enforceable contractual relationship for permanent employment exists or existed between plaintiff and defendant Fibreboard, due to the Statute of Frauds.

8. The District Court erred in holding that plaintiff and defendant Fibreboard agreed that plaintiff should be employed as a recovery operator.

9. The District Court erred in failing to hold that, even if plaintiff and defendant Fibreboard had agreed to a contract of employment, the alleged contract was for an indefinite period of time.

10. The District Court erred in failing to hold that any contract of employment between plaintiff and defendant Fibreboard was lacking in mutuality.

11. The District Court erred in failing to hold that plaintiff was engaged in a temporary job at the time of the alleged contract and that plaintiff did not leave a permanent job or any other job at the request of the defendant Fibreboard or its agents, or in order to perform a contract with defendant Fibreboard.



12. The District Court erred in failing to hold that plaintiff left temporary employment and removed his family to California and paid his expenses for such move and disposed of his furniture and personal belongings at his own risk and for his own purposes and not in reliance upon or in consideration of any promise, contract, or agreement for permanent employment by defendant Fibreboard or its agents.

13. The District Court erred in holding that plaintiff has performed all things and matters to be performed on his part and that defendant Fibreboard has wholly failed to perform things and matters on its part to be performed.

14. The District Court erred in failing to hold that defendant Fibreboard offered permanent employment to plaintiff and that plaintiff refused the same.

15. The District Court erred in failing to find that plaintiff failed to minimize his damages by accepting employment offered him by defendant on or about September 1, 1949.

16. The District Court erred in failing to hold that defendant Fibreboard has performed all things and matters on its part to be performed.

17. The District Court erred in holding that defendant Fibreboard breached a contract of employment with plaintiff.

18. The District Court erred in holding that

plaintiff is entitled to judgment in the sum of \$2,530.24, together with costs of suit.

19. The District Court erred in failing to hold that the complaint should be dismissed and in failing to award defendant Fibreboard its costs.

Dated October 27, 1951.

/s/ SAMUEL L. HOLMES,

BROBECK, PHLEGER &  
HARRISON,

Attorneys for Appellant  
Fibreboard Products, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed October 30, 1951.

No. 13,141

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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FIBREBOARD PRODUCTS INC.,  
a Corporation, et al.,

*Appellant,*

vs.

W. H. TOWNSEND,

*Appellee.*

---

Opening Brief of Appellant  
Fibreboard Products Inc.

---

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**FILED**

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PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

JAN 12 1952

PAUL P. O'BRIEN





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IN THE  
**United States  
Court of Appeals**  
**For the Ninth Circuit**

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FIBREBOARD PRODUCTS INC.,  
a Corporation, et al.,

*Appellant,*

vs.

W. H. TOWNSEND,

*Appellee.*

---

**Opening Brief of Appellant  
Fibreboard Products Inc.**

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**JURISDICTION**

This is an appeal from a final judgment of the District Court for the Northern District of California, Southern Division, entered on September 20, 1951 (34-5).<sup>\*</sup> Notice of appeal was filed on October 3, 1951 (36).

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<sup>\*</sup>References to pages of the transcript are shown by the page numbers in parentheses: ( )

Exhibits are referred to by appropriate letter or number following the designation of plaintiff or defendant: (P- ) or (D- ).

Page of the record for an exhibit is shown by page number preceding the letter indicating whose exhibit is referred to, with the letter or number of the exhibit following: ( P- ).

The District Court exercised jurisdiction in this matter pursuant to the provisions of Title 28, U.S.C., Sec. 1332, and by virtue of the facts that appellant Fibreboard Products Inc. (defendant below) is a Delaware corporation and appellee (plaintiff below) is a citizen of the State of California and the amount in controversy exceeds \$3,000.00, exclusive of interest and costs (First Amended Complaint, 7-12).

This Court has jurisdiction pursuant to the provisions of Title 28, U.S.C., Sec. 1291.

## **STATEMENT OF THE CASE**

### **I. Nature of Case Raised by the Pleadings.**

Plaintiff filed this action seeking damages for breach of an alleged oral and written employment contract with defendant Fibreboard entered on October 18, 1948, at Antioch, California. Plaintiff alleged that the employment was to be as a recovery operator at defendant's San Joaquin Division plant at the rate of \$1.725 per hour, for so long as plaintiff should desire to be employed and for so long as his work should be satisfactory. The employment was also alleged to be commenced upon the completion of the plant and to be continuous and permanent. Plaintiff further alleged that it was agreed that it would be necessary for him to remove from Tuscaloosa, Alabama, to Antioch, California, and that, in consideration of plaintiff's acceptance of employment and removal to Antioch, defendant would pay the reasonable cost of transportation of plaintiff and his family. Plaintiff alleged that he did transport himself and family to California and that in order to do so he had to sell his household furnishings and effects and that upon

arrival in Antioch he had to rent housing accommodations more expensive than those he left in Alabama. Plaintiff alleged that the plant was ready for operation in October, 1949, that he was qualified to perform the work agreed upon, and that he offered to go to work on November 2, 1949, and was refused employment (First Amended Complaint, 7-12).

Defendant generally denied that any contract was entered and affirmatively alleged that employment had been offered plaintiff on or about August 31, 1949, which plaintiff refused. Defendant further affirmatively alleged that the contracts alleged by plaintiff are invalid and unenforceable in that they are not in writing and subscribed by the party to be charged or by his agent (First Amended Answer, 18-20).

By its answer and by the proof defendant raised questions as to the existence of any contract, as to the enforceability of the alleged contract or contracts, on various grounds, and as to a refusal by plaintiff of an offer of performance by defendant if any contract existed.

## **II. Specification of Errors Relied Upon.**

Appellant's statement of points on which it intends to rely on this appeal are set forth at pages 231-4 of the record. They are 19 in number, but may be summarized as follows:

1. The District Court erred in entering judgment for plaintiff and in failing to enter judgment for defendant.
2. The District Court erred in holding that the parties entered any contract, oral or written or oral and written.
3. The District Court erred in holding that defendant agreed to employ plaintiff as a recovery operator.

4. The District Court erred in failing to hold that the parties discussed employment of plaintiff by defendant orally and in writing without entering a contract and that no contract was entered due to the pendency of defendant's investigation of plaintiff's qualifications and due to the fact that negotiations were not completed.

5. The District Court erred in failing to hold that even if an agreement had been entered it was unenforceable due to its uncertainty, due to the fact that it was terminable at will, due to lack of mutuality in that plaintiff reserved a right to terminate at any time, and due to the fact that there exists no memorandum signed by the party to be charged to satisfy the requirements of the statute of frauds.

6. The District Court erred in failing to hold that defendant offered plaintiff employment, which offer discharged any obligation it may have had, and further that plaintiff failed to minimize damages by accepting employment offered him by defendant.

7. The District Court erred in holding that the parties agreed that plaintiff would remove himself from Tuscaloosa, Alabama, to Antioch, California.

8. The District Court erred in failing to hold that plaintiff left temporary employment in Alabama and removed himself and his family to Antioch, California, and paid his expenses for such moving and disposed of his furniture and belongings at his own risk and for his own purposes and not in reliance upon or in consideration of any promise, contract or agreement for permanent employment by defendant or its agents.

9. The District Court erred in holding that defendant breached a contract of employment with plaintiff and that



plaintiff has performed things and matters on his part to be performed and that defendant failed to perform things and matters on its part and in failing to hold that defendant has performed all things and matters on its part to be performed.

### **III. The Essential Facts.**

In 1948 defendant was constructing a new plant, called San Joaquin Division, near Antioch, California, a few miles from another plant known as Antioch Division (120) which it had operated for many years. Of a contemplated 68 employees in the department known as the pulp mill it was planned to hire all but 25 locally and the rest from out of the state (146-7). Among other methods of obtaining a list of applicants from which it could select qualified employees for the pulp mill and the other departments it placed an anonymous advertisement in two issues of a trade journal called Southern Pulp & Paper Manufacturer (190). The trade journal circulated generally in the Southern states, where part of the pulp and paper industry is located and where some applicants might be found. Among the many responses to the advertisement was a letter from plaintiff (39 P-1) dated August 26, 1948, which was accompanied by a recommendation (72 P-5) dated February 1, 1944.

Correspondence ensued between plaintiff and defendant, including defendant's reply to the first letter (41 P-2) dated September 1, 1948, plaintiff's second letter (90 D-A) dated September 7, 1948, the accompanying application of the same date (93 D-B), and a letter to plaintiff (45 P-3) dated October 19, 1948.

The documents just enumerated, either singly or collectively, were found by the District Court to constitute a

written contract for permanent employment or at least the written portion of the "oral and written permanent contract of employment" (Findings, 31). An examination of the documents fails to reveal any mutual understanding that plaintiff was hired or was agreed to be hired for any particular job or at all. Plaintiff's letter of August 26 made application for "one of the jobs" at the new plant (39). The letter of recommendation is immaterial as it could not have formed part of a contract between these parties. Defendant's letter of September 1 enclosed an application blank and specifically cautioned plaintiff that the company was not making any commitments. Plaintiff's second letter (90 D-A) stated that he would appreciate "any job you people have to offer me." The application form submitted with the letter asked the kind of work desired and plaintiff had replied: "Pulp mill tour foreman" (93 D-B).

The next document was a letter to plaintiff written after plaintiff had telephoned the plant. The subject of the letter appeared immediately after plaintiff's name and address, as follows:

*"Possibility of Employment in Recovery Department."*  
(Emphasis supplied.)

The body of the letter made no mention of any permanent employment. It advised that the plant would begin operations about the 1st of March (4½ months later) and warned of the critical housing situation. It held out one hope to plaintiff, i.e., that he could obtain temporary work at another mill if it were *his desire* to come to the coast earlier than March (45 P-3).

In none of the documents is there an offer to employ plaintiff or an acceptance of his application for permanent

employment by defendant as a *recovery operator*. There is no evidence in these documents, the only documents in the record which could possibly be the written contract, to support the finding of the District Court that the parties entered a written contract for permanent employment of plaintiff as a recovery operator on or about October 18, 1948, or at any other time.

The plaintiff was the only witness on his behalf and an examination of his testimony, disregarding all conflicting testimony, reveals no support for the finding of the District Court that an oral contract for permanent employment was entered on October 18, 1948, or at any other time. Plaintiff testified that he made application for a tour foreman's job (142). This apparently referred to the application (93 D-B) which accompanied (and contradicted) the letter in which he stated that he would take *any job that was offered*. Plaintiff further testified that he made a telephone call to Mr. Lindley, the pulp mill superintendent at the new plant on October 18, 1948. That telephone call furnished the date which the District Court apparently considered to be culmination of contract negotiations. Nowhere in plaintiff's testimony concerning that conversation or in Mr. Lindley's testimony concerning that conversation is there any evidence of an agreement to hire plaintiff in a permanent job as a recovery operator. On the contrary the record shows that the *job of recovery operator was not mentioned* in that conversation by either person. Plaintiff said that Lindley told him he would be placed in another plant until he could be used if he "wanted a position" (43). (Emphasis supplied.) Plaintiff also testified Lindley told him he could depend on "it" to be a permanent job (43). According to

plaintiff's later testimony, the *first* time that any agreement to hire him as a recovery operator could have been made was on November 15, 1948, the day when plaintiff presented himself at the plant in Antioch and applied for a job (95). By that date he had already moved himself and his family to California. He asserted in his testimony that at that time Lindley told him he could "pick out any job you want in the pulp mill," to which he replied that he would "apply for a recovery operator's job" (54, 55). Plaintiff later said that on the 15th of November he was "assigned as a recovery operator" (71).

On cross-examination plaintiff was shown the original Complaint, which he had verified and in which it was alleged that defendant had agreed on October 18, 1948, to employ him as a recovery operator for an indefinite time. After observing that allegation plaintiff stated:

"There was nothing said about recovery operator until the 15th of November when I arrived at the San Joaquin plant" (95).

Plaintiff was cross-examined about the details of the October 18 telephone conversation with Lindley to determine whether there had been an agreement to hire him in a particular job in that conversation. The testimony was as follows (96-7):

"Q. (By Mr. Holmes): When did Mr. Lindley say anything to you about the job as recovery operator?

A. On the 15th of November.

Q. He didn't say anything about the recovery operator's job in your telephone conversation?

A. No, sir; he told me Mr. Stitt had given him my recommendation from the North Carolina Pulp Company and my application for employment and it seemed I was an experienced Kraft pulp mill man.



Q. He didn't promise you any particular job at all?

A. That's right.

Q. You didn't know what it would be?

A. Presumably it would be a tour foreman's job.

That was the last job I had.

Q. Which was what you applied for?

A. Yes, sir.

Q. That is what you wanted?

A. That is what I wanted.

Q. He didn't promise you that or any other job on October 18th? [73]

A. No, sir; he just told me if I would come down they would place me in one of the other mills until such time, and that I could work in that until it was open, and I could stay here and the company would help me buy a home if I wasn't able to buy one."

Plaintiff testified that Lindley told him in the October 18th telephone conversation that the defendant would refund his transportation expense (43) and would help him buy a house (96). Lindley denied both statements (115, 116).

The subject of payment for plaintiff's transportation was not raised by him when he arrived in California nor for months afterwards (100). Plaintiff testified that Mr. Stitt, Manager of the San Joaquin Division, promised him the transportation refund the following August (68), but this was directly denied by Stitt (181, 201).

The District Court must have credited the denials as no finding was based on plaintiff's claim either for transportation or help in buying a house.

Lindley testified that he made no promise to or agreement with plaintiff in the telephone conversation other

than that he would endeavor to find plaintiff temporary work at another mill while his qualifications and references were investigated to determine whether he would be hired at the new plant. Lindley denied that the telephone conversation concerned any particular job (116), which denial is in accord with plaintiff's own testimony.

The asserted promises to help plaintiff buy a house and to refund transportation expense were not seriously contended for. Like the alleged contract for employment they lacked any definiteness and certainty.

The bulk of the remaining record concerns plaintiff's conversations and activities after his arrival in California. The most important testimony concerns the offer to plaintiff of a job as a broke (waste) baler operator.

In the summer of 1949 plaintiff asked Lindley to employ him so he could qualify as a delegate to a convention and was refused (123). Late in August, when the new plant was nearly ready to open, he telephoned Lindley again to ask about employment (59). He met Lindley pursuant to the telephone call and was told at that time that he was not going to be employed in Lindley's department (62, 125-7). His application remained on file and he was referred to another department head, Mr. Fuller, a few days later (216, 222). Fuller offered him the baler operator job on or about August 31. Plaintiff informed Fuller that he already had a higher paying job and effectively refused the offer (65-6, 97, 174, 175, 183, 185, 222-4). He did so despite his knowledge that the job he held at the Antioch Division was only temporary, pending a determination of whether he would be employed at the San Joaquin Division (60). The District Court failed to make a finding on this issue.

**ARGUMENT****I. Summary of the Argument.**

The issues presented here all relate to basic principles of contracts. The evidence in the record fails to provide the essentials of a valid, enforceable agreement in several particulars.

It is elementary that the proof must show a definite and certain mutual understanding between the parties, but none was proved in this case.

A contract must impose mutual obligations to be enforceable, but this alleged contract was terminable at any time by the plaintiff without his incurring any liability.

Similarly, a contract which is for an indefinite time is terminable at the will of either party without liability except for performance already rendered. The District Court was of the opinion that some consideration other than the agreement to work was furnished by this plaintiff, making the last mentioned principle inapplicable, but leaving a temporary job is not recognized as adequate consideration under the California cases and the evidence shows that plaintiff moved to California because of his *own desire* and not at the request of defendant.

Finally, the alleged contract is legally only an oral contract and is unenforceable because a contract for permanent employment, if for a consideration other than the services, is incapable of performance within one year and there is no writing signed by the party to be charged, or his agent, sufficient to satisfy the requirements of the statute of frauds.

There can be no doubt that this contract, alleged to have been made in California and certainly performable in California, is to be construed under the laws of that state.

## II. No Contract Existed Due to Uncertainty as to Terms.

The law is established beyond cavil that the terms of a contract must be certain and definite. The reason for the rule lies, of course, in the necessity for mutual assent to the undertaking of each party—the meeting of the minds. Where the contract is incomplete, uncertain and lacking in essential terms, no action will lie for its breach. This doctrine was stated by the California Supreme Court in *Talmadge v. Arrowhead R. Co.*, 101 C. 367, 371, 35 P. 1000, and *Van Slyke v. Broadway Ins. Co.*, 115 C. 644, 47 P. 689, 690, 928. It has been repeated by other appellate courts in *Nelson v. F. A. Levy Co.*, 26 C.A. 367, 147 P. 1058; *Wineburgh v. Gay*, 27 C.A. 603, 605, 150 P. 1003; *Chas. Brown & Sons v. White Lunch Co.*, 92 C.A. 457, 461, 208 P. 490; *Sarina v. Pedrotti*, 103 C.A. 203, 208, 284 P. 472, and *Blake v. Mosher*, 11 C.A.2d 532, 54 P.2d 492.

In addition to these authorities, there is the well-known case of *Mason v. Rose*, 176 F.2d 486, frequently cited for its discussion on conflicts of laws, in which the United States Court of Appeals for the 2nd Circuit applied California law to a contract of joint venture, entered in England to be performed in California. In that case a long and detailed letter under which Mason was to perform services was held to be too indefinite in essential terms to be a valid contract.

The doctrine was recently discussed in *Goehring v. Stockton Morris Plan Co.*, 93 C.A.2d 417, 209 P.2d 41. At page 420 the Court said:

“This court, in *Sarina v. Pedrotti*, 103 Cal. App. 203, 208 [284 P. 472], quoting from *Talmadge v. Arrowhead R. Co.*, 101 Cal. 367, 371, held [35 P. 1000]: ‘It is well settled that no action will lie to enforce the per-



formance of a contract, or to recover damages for its breach, unless it be complete and certain; \* \* \*

“This court, in *Blake v. Mosher*, 11 Cal. App. 2d 532, 535 [54 P.2d 492], quoted from 13 Corpus Juris, page 263, as follows: ‘In order that there may be an agreement, the parties must have a distinct intention common to both, and without doubt or difference. Until all understand alike, there can be no assent, and therefore no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled or no mode is agreed on by which it may be settled, there is no agreement, \* \* \*’ It also quoted 6 California Jurisprudence, page 43, where it is said: ‘There can be no contract unless the minds of the parties have met and mutually agreed. Consent is not mutual unless all parties agree upon the same thing in the same sense,’ and page 216, where it states: ‘A contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained; an indefinite contract cannot be enforced because the courts cannot know to what the parties agreed.’

“In *Reymond v. Laboudigue*, 148 Cal. 691, 694 [84 P. 189], the court quoted with approval the following from 26 American and English Encyclopedia of Law (2d ed.), page 33: ‘The contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained, as an indefinite contract cannot be enforced, because the courts do not know what the parties agreed. The meaning and intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof.’ Also, see *Wineburgh v. Gay*, 27 Cal. App. 603, 605 [150 P. 1003].”

The case of *Townsend v. Flotill Products, Inc.*, 82 C.A.2d 863, 187 P.2d 466, throws additional light on the question

of the existence of a contract in this case. It was there held that negotiations constituting an agreement to enter into a contract at a future date are not binding. On the evidentiary quality of plaintiff's testimony here the opinion is particularly pertinent (p. 866) :

“Before the court can say that an express contract is proven, there must be something more than the deductions or conclusions of the witness from the words used.”

The application of the doctrine of these cases is readily apparent. Plaintiff alleged in his complaint that a contract was entered to employ him as a recovery operator. That is a specific job in the recovery department of the pulp mill. The District Court made a finding in accordance with the pleading, to the effect that the oral and written discussions culminated in a binding contract on October 18, 1948. The evidence, however, shows *without any conflict* that the position of recovery operator was never mentioned by the parties in their correspondence or discussions. The evidence shows without contradiction that the position of recovery operator was not the subject of any discussion until November 15 when, according to the plaintiff, he selected the job. He asserted he was offered his choice at that time because all of the salaried positions were filled. We are at a loss to understand how the District Court reached its conclusion in the absence of *any* evidence that the job as recovery operator was discussed on or prior to the date when the alleged contract was entered.

That the designation of the particular job is an essential element of the contract of employment is a point that hardly needs laboring. There are several types of jobs in the re-

covery department and dozens more in the plant as a whole. If the employment contract were not for a job as recovery operator, then it must be for none at all or for any available job. Plaintiff chose to base his case on the contention that a specific job was agreed to, but he failed to prove it. If he had contended that the agreement was for any job, type and nature unspecified, his argument would have been just as untenable, for his refusal of the job of broke baler operator furnishes a complete defense, as is more particularly developed hereafter.

As the proof stands, plaintiff claims the contract was entered on October 18 for employment as recovery operator, on the strength of which, he claims, he moved from Alabama to California. The claim is rebuffed by his own admissions and other proof that there was no definite agreement in any respect on or before that date. The most that can be said is that there were discussions or negotiations looking toward possible employment. The climax of those discussions was never reached and an indispensable element of an employment contract, i.e., the mutual assent to the particular job, was never provided. An employment contract unrelated to a particular job is meaningless. That major uncertainty should dispose of the case as such a contract is too vague and indefinite for the law to recognize it and give damages for a breach.

### **III. Liability of Defendant Was Discharged by Plaintiff's Rejection of an Offer of Performance.**

No liability can attach where a promisee refuses a promisor's offer to perform. Whatever liability may have existed prior to that time is discharged. California Civil Code, Sec.

1485, et seq., *Flickinger v. Heck*, 187 C. 111, 115, 200 P. 1045. Plaintiff herein was offered a job in the new plant, but, with knowledge of the fact that he was retained at the Antioch Division only on a temporary basis until it was determined whether he could be used at the new plant, he told the department head who offered him the job that he was already employed at a higher wage. Whether plaintiff took this peculiar action in an attempt to dicker for a higher wage rate or in an attempt to obtain the offered job for his brother-in-law is uncertain. The important thing about the transaction is that the job was offered to plaintiff and his response amounted to an outright rejection of the offer. (See 106-7 in addition to references above (p. 10) on this matter.)

Since the proof shows that the contract upon which plaintiff sues was not for the job which he alleged it to be, the most that it could have been was for any job which was available. Such a job was offered to him; he had done it on a temporary basis a few weeks earlier and admitted he was competent to perform it (111-112). His rejection of the offer discharged any obligation owing to him.

#### **IV. The Alleged Contract Was Unenforceable for Lack of Mutuality.**

A contract containing an unconditional right of one party to terminate and cancel it at any time is lacking in mutuality and is not binding upon the other party. The principle has been applied by California courts in *Chas. Brown & Sons v. White Lunch Co.*, 92 C.A. 457, 461, 268 P. 490; *County of Alameda v. Ross*, 32 C.A.2d 135, 145, 89 P.2d 460, and *Fabbro v. Dardi & Co.*, 93 C.A.2d 247, 251, 209 P.2d 91.



In a recent case the defendant was obligated under a purported contract to pay the plaintiff \$100 per week for six months and in return received the exclusive services of the plaintiff for acting, modeling and other commercial appearances, but the plaintiff was not obligated to accept any engagements. The contract was held to be unenforceable due to lack of mutuality. *Weston v. Kaplan*, 82 C.A.2d 390, 186 P.2d 162. Plaintiff herein brought his case within the rule of the *Weston* case by his testimony that he was entitled under the contract to quit at any time.

By reserving the right to end the agreement at any time plaintiff made the contract effective only at his will. He was not required to work permanently or for a reasonable time or even until he gave notice (97-99). Nothing in the alleged agreement upon which he sues required him either to report for work in the first instance or to work a single day thereafter. The choice was entirely and unconditionally his. According to the plaintiff a permanent job was offered him, but in return he gave the defendant only the illusory promise that he would work as long as he desired. Such an agreement is not binding on either party.

The question of consideration and the question of mutuality are sometimes confused, but the *Weston* case illustrates the distinction. The plaintiff in that case gave consideration for the agreement, for she suffered a detriment in giving the defendant an exclusive agency for her commercial appearances. Despite that consideration no valid contract was entered because the plaintiff could still refuse to do any work.

The matter of mutuality of obligation is also clearly distinguishable from mutuality of remedy. The latter is a

peculiarly equitable doctrine applicable in cases where specific performance is sought. Mutuality of obligation on the other hand is a fundamental doctrine of contract law in determining whether a valid contract exists.

The *Weston* case illustrates that mutuality is just as important to contracts of employment as it is to contracts for the sale of goods such as were involved in the *Brown* and *Fabbro* cases.

Only one additional point need be made here, that is, that part performance has no effect upon the doctrine of mutuality of obligation. This is established by the *Fabbro* and *Brown* cases. As stated in the *Fabbro* case, page 251:

“Mutuality is absent when one party to a contract reserves an absolute right to cancel or terminate it at any time. \* \* \* The law is well settled that, where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be binding upon the parties only to the extent it has been performed.”

Despite the fact that one party may have done some act bargained for, where he assumes no burden to render services for any other time that he chooses, mutuality is lacking and the contract is not binding on the defendant. If services have been performed, liability extends only to that extent and there is no liability for a breach of contract.

In this case plaintiff was promised at most a temporary job. He was employed in such a job and was fully paid for it. No obligation existed beyond that.

## **V. The Alleged Contract Was Unenforceable as It Was Terminable at the Will of Either Party.**

An employment having no specified term may be terminated at any time by either the employer or the employee on notice to the other. *California Labor Code*, Sec. 2922; *Thacker v. American Foundry*, 78 C.A.2d 76, 84, 177 P.2d 322; *Mile v. California Growers Wineries, Inc.*, 45 C.A.2d 674, 679, 114 P.2d 651; *Adkins v. Model Laundry Co.*, 92 C.A. 575, 581; 268 P. 939; *Lord v. Goldberg*, 81 C. 596, 22 P. 1126.

The District Court found that plaintiff had a contract for "permanent" employment, but that description does not affect the application of the general rule, for "permanent" means an indefinite term. *Speegle v. Board of Fire Underwriters*, 29 C.2d 34, 39; 172 P.2d 867. A contract for permanent employment is only a contract for an indefinite period, terminable at the will of either party, unless it is based on some consideration other than the services to be rendered.

The District Court apparently believed that plaintiff's case fell within the exception from the above rule on the ground that he furnished some consideration for this alleged contract. In the Order for Judgment the cases of *Millsap v. National Funding Corp.*, 57 C.A.2d 772, 135 P.2d 407, and *Seifert v. Arnold Bros., Inc.*, 138 C.A. 324, 31 P.2d 1059, are referred to. The Court mentions that plaintiff quit a job in Alabama and moved to California. Presumably that was believed to be consideration.

The *Millsap* and *Seifert* cases, however, do not govern this action. In the first place plaintiff quit a temporary job which was about to end (Deposition of Utley, Question 18,

p. 24, and Answer 18, p. 26, Questions 21 and 22, p. 24, and Answers 21 and 22, p. 27). In the *Thacker* case, which discussed the *Millsap* case at some length, it was pointed out that no such prejudice has been suffered where a temporary job is left sufficient to afford consideration to support a contract for the continuance of employment for any particular period of time. Secondly, the principal of the *Seifert* and *Millsap* cases is limited, as stated in the *Thacker* case at pages 83 to 85, to those factual situations where there is an *express* declaration or understanding between the parties that plaintiff would not give up present employment or other things of value unless defendant agreed to employ him permanently. No express declaration that plaintiff would take a job only on certain terms was proved in this case.

The element of consideration mentioned in the Findings was the movement of plaintiff from Alabama to California. An examination of the evidence shows that defendant did not ask for or induce the plaintiff's removal to California. At the time plaintiff and Mr. Lindley discussed the possibility of employment at Antioch the plant was not expected to begin operations for about 4½ months. This was repeated to the plaintiff in the letter of October 19, which made plaintiff's migration a matter of his personal "desire." The letter referred to the subject of his discussions with Lindley as "possibility of employment." In view of the fact that the final communication between the parties prior to the plaintiff's exodus to California placed him on notice that, as far as the prospective employer was concerned, the employment existed only in the realm of *possibility*, the finding that plaintiff's unexpected and sudden removal to



California was induced by or contemplated by the defendant as the *quid pro quo* of an agreement to employ him permanently is plainly contrary to the evidence. Defendant held out the hope for temporary work only and that was furnished for a period of more than 8 months.

If this alleged contract was, as we urge, terminable at the will of either party, on the grounds stated above, it is immaterial whether it was written or oral, for no liability can attach. If, however, this Court finds that the agreement was not terminable at the will of either party, then the section of this brief immediately following is of supervening importance. Its place near the end is not to be mistaken as an indication of a lack of importance.

#### **VI. The Alleged Contract Is Not Enforceable Under the Statute of Frauds.**

A contract for permanent employment has been found by the District Court to be a contract for a reasonable period and a reasonable period is stated to be two years. The finding was based on the *Millsap* decision that "permanent" means two years when there is good consideration for a contract of employment. As discussed above, the *Millsap* case is an exception to the rule that contracts for an indefinite period are terminable at will. The exception is not applicable here, but we do not argue with the theory established in that case that permanent employment means two years where the contract is not terminable at will. Since permanent employment means two years, a contract purporting to be for permanent employment falls within the first provision of the California statute of frauds:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writ-

ing and subscribed by the party to be charged or by his agent:

"1. An agreement that by its terms is not to be performed within a year from the making thereof; \* \* \*." (California Civil Code, Sec. 1624.)

The Federal Courts, where the statute of frauds is involved, look to the law of the state of the forum and if thereby a statute is held to be procedural and remedial, it is controlling. *Levi v. Murrell*, 63 F.2d 670. The statute of frauds is a procedural statute in California. *O'Brien v. O'Brien*, 197 C. 577, 586, 241 P. 861. Therefore, it controls this case.

In order to satisfy the requirements of the statute, plaintiff's alleged contract must have been performable within one year from October 19, 1948, or must be the subject of a sufficient memorandum signed by the party to be charged.

In considering the time element it must be remembered that even under plaintiff's proof the employment would not start until some 4½ months after the agreement was entered, for the plant operations were not contemplated to begin until March. Under California law the measurement of one year begins the day after the execution of the agreement. An employment commencing seven days subsequent to the making of an oral contract and extending one year thereafter has been held within subdivision 1 of the statute. *Kraft v. Rooke*, 103 C.A. 552, 284 P. 935. Therefore plaintiff's contract for employment for two years had to be performable within the 7½ months remaining after the contemplated opening of the plant in the first part of March in order to exempt it from the operation of the statute.

We may next inquire whether there is a written memorandum sufficient to satisfy the requirements of the statute. The writing must contain the terms and conditions of the promises constituting the contract and recovery may not be predicated on parol proof of material terms omitted from the written memorandum, even though the oral understanding is entirely consistent with and in no way tends to vary or contradict the written instruments. *Ellis v. Klaff*, 96 C.A.2d 471, 476-7, 216 P.2d 15.

Although the District Court found this alleged contract to be "oral and written," whatever oral elements were referred to must be ignored in determining whether or not there is a memorandum adequate to satisfy the statute. A writing which purports to be a memorial of an agreement within the statute must contain its essential terms and its material elements without recourse to parol evidence of the intention of the parties. *Salomon v. Cooper*, 98 C.A. 2d 521, 220 P.2d 774, which follows the older case of *Dillingham v. Dahlgren*, 52 C.A. 322, 198 P. 832.

Plaintiff's testimony of his telephone conversations with Mr. Lindley cannot be mixed with the written documents to prove a written contract. Where written documents signed by the parties do not purport to evidence the whole agreement and other terms are arrived at orally, the contract is in legal effect an oral contract. *California Employment Stabilization Commission v. Matcovich*, 74 C.A.2d 398, 401, 168 P.2d 702. A contract partly in writing and partly oral is in legal effect an oral contract; it occurs where an incomplete writing or one expressing only a part of what is meant is by words rounded into a full contract. *Laughlin v. Haberfeld*, 72 C.A.2d 780, 785, 165 P.2d 544. In considering whether

a contract exists, parol evidence may be used. However, where the statute of frauds is involved, parol evidence may not be considered, even if admitted without objection, to furnish the terms of a written agreement. *Ellis v. Klaff*, 96 C.A.2d 471, 476-8, 216 P.2d 15.

Considering the only writings out of which a written agreement may be developed, plaintiff's exhibits 1, 2 and 3 and defendant's exhibits A and B, it is impossible to determine the job which it is claimed was the subject of the contract. The final writing, Lindley's letter of October 19, can be interpreted only to mean that the terms of employment had not been reached. Certainly a letter which has as its subject "possibility of employment" and fails to mention any particular job is not sufficiently definite and certain to satisfy the requirements of the statute of frauds.

It may be that the District Court considered that the plaintiff's move from Alabama to California somehow exempted this alleged contract from the operation of the statute. The cases do not support that conclusion. In a similar situation it has been held that an oral agreement for an actor's engagement, made with a producer while the actor was still performing in another state, for services for one year in California if he would remove there is within the statute of frauds. *Standing v. Morosco*, 43 C.A. 244, 185 P. 954. The fact that the plaintiff in that case migrated from one state to another was ineffectual to prevent the operation of the statute.

It has been recently held that an oral agreement of employment for five years is invalid under the statute of frauds and part performance does not cure the invalidity. *Brockman v. Lane*, 103 C.A.2d 802, 805, 230 P.2d 369. In



another very recent case, decided by the California Supreme Court, it was held that, despite the fact that an employee had given up a permanent position and had entered upon and worked for a substantial period pursuant to an oral agreement for employment for a term of five years, the employer was not estopped to raise the statute of frauds as a defense and the contract was invalid and unenforceable. *Ruinello v. Murray*, 36 C.2d 687, 227 P.2d 251.

Since the writings in this case do not show the job which was the subject of the contract and plainly prove that the parties were still negotiating without having reached a mutual understanding, they are insufficient to make out the essentials of a contract. Mixing writings and oral discussions produces at most merely an oral contract, voidable at the election of either party. *Souza v. First California Co.*, 101 C.A.2d 533, 225 P.2d 955. If the mixture were any contract it was oral in legal cognizance and within the statute of frauds. Each party accepted the risk that the other may withdraw and no liability attaches when one does withdraw, whether it be before or after performance is entered upon. Considering the written material alone, it is clear that no agreement to hire plaintiff as a recovery operator was ever reached.

**CONCLUSION**

It is submitted that the judgment should be reversed. Since all the pertinent facts are before the Court, it is further submitted that the District Court should be directed to enter judgment for defendant for its costs of suit.

Dated: San Francisco, California, January 11, 1952.

Respectfully submitted,

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No. 13,141

IN THE

United States Court of Appeals  
For the Ninth Circuit

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FIBREBOARD PRODUCTS, INC. (a corporation),

*Appellant,*

vs.

W. H. TOWNSEND,

*Appellee.*

BRIEF FOR APPELLEE.

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FILED

FEB 29 1952

PAUL P. O'BRIEN  
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**BRIEF FOR APPELLEE.**

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**THE OPINION BELOW.**

The District Court, sitting without a jury, wrote an opinion ordering judgment for the appellee, plaintiff below, in the sum of \$2,530.25, with interest thereon at the rate of seven per cent per annum from the date thereof (29, 30).<sup>1</sup> The Court entered findings of fact and conclusions of law in support of its order for judgment and thereby entered judgment (31-36).

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<sup>1</sup>References to pages of the Transcript are shown by the page numbers in parentheses: ( ).

Exhibits are referred to by appropriate letter or number following the designation of plaintiff or defendant: (P.....) or (D.....).

Page of the record for an exhibit is shown by page number preceding the letter indicating whose exhibit is referred to, with the letter or number of the exhibit following: (.....P.....).

## **JURISDICTION.**

Final judgment was entered in this case on September 20, 1951 (34, 35). The jurisdiction of the District Court was invoked pursuant to the provisions of Title 28, U.S.C. Sec. 1332, and by virtue of the facts that appellant Fibreboard Products, Inc. (defendant below) is a Delaware corporation and appellee (plaintiff below) is a citizen of the State of California and the amount in controversy exceeds \$3,000, exclusive of interest and costs (First Amended Complaint, 7-12).

This Court has jurisdiction pursuant to the provisions of Title 28, U.S.C., Sec. 1291.

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## **STATEMENT OF THE CASE.**

### **I. NATURE OF CASE RAISED BY THE PLEADINGS.**

Appellant in its opening brief has substantially stated the issues involved in the pleadings of the parties (Appellant's Opening Brief 2, 3).

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### **II. QUESTIONS PRESENTED.**

Appellant's statement of points on which it intends to rely is set forth at pages 231-234 of the record. They are nineteen in number, but appellant has summarized them to a total of nine (Appellant's Opening Brief 3, 4, 5) and has further reduced them to the following questions:

A. No contract existed due to uncertainty as to terms.



B. Liability of defendant was discharged by plaintiff's rejection of an offer of performance.

C. The alleged contract was unenforceable for lack of mutuality.

D. The alleged contract was unenforceable as it was terminable at the will of either party.

E. The alleged contract was not enforceable under the statute of frauds.

---

### III. THE FACTS.

The Court sitting without a jury, after hearing all the evidence submitted, found as follows:

A. That on or about the 18th day of October, 1948, the plaintiff and the defendant Fibreboard Products, Inc., entered into an oral and written permanent contract of employment whereby the parties mutually agreed that plaintiff should be employed by defendant corporation in the capacity of a recovery operator in the Recovery Department of the San Joaquin Division of said defendant corporation's newly constructed paper pulp mill plant at Antioch, California, said employment to commence when defendant's paper mill plant began operations, and to continue for so long as plaintiff's work was satisfactory, and that plaintiff's permanent position would be at the prevailing hourly rate of \$1.725 per hour, forty hours per week, fifty-two weeks per year. It was further agreed that plaintiff would remove from the City of Tuscaloosa, Alabama, to Antioch, California, and pending the opening of defendant's paper pulp mill,

said defendant would endeavor to find other employment for plaintiff.

B. That at the time of the agreement between the parties, defendant corporation was advertising for and in need of experienced paper pulp men, and was creating a labor pool of experienced pulp mill men in contemplation of the opening of the pulp mill plant in Antioch, California.

C. That plaintiff had had many years of experience in many phases of the paper pulp mill industry and was a seasoned and experienced recovery operator.

D. That plaintiff was gainfully employed in Tuscaloosa, Alabama, at the time of the agreement and that he did leave said employment and did remove with his family to Antioch, California, and that he did pay his own expenses for said move, and plaintiff did dispose of his furniture and personal belongings in order to remove to defendant's place of employment.

E. That on or about November 2, 1949, defendant corporation's paper pulp mill was ready for operation, at which time, plaintiff did present himself ready, willing, and able to perform his part of the contract of employment.

F. That when the employment for which plaintiff was contracted became available, defendant corporation refused, and does now refuse, to fulfill the terms of the said contract, and refused, and does now refuse, to employ the plaintiff.

G. That plaintiff has performed all of the things and matters on his part to be performed under the terms of the said contract and that defendant corporation has wholly failed to perform the things and matters on its part to be performed under the said contract of employment.

H. That a contract for permanent employment in the State of California is a contract to retain in employment for a reasonable period of time, and that a reasonable period of time is two years.

I. That had plaintiff entered into the employ of defendant corporation as contracted at the time plaintiff presented himself ready, willing, and able, to the said defendant corporation, he would have earned the sum of \$7,176.00 during a two year period. If plaintiff continues in his present occupation, he will have earned \$4,645.75, or sustained a loss of earnings for the two-year period in the sum of \$2,530.25.

The facts, generally stated, are that plaintiff, who for a period of twenty years had worked in pulp mills, having been a tour foreman or general foreman for the North Carolina Pulp Company (72 P-5, 53) was working for the Otis Elevator Company in Tuscaloosa, Alabama, earning \$1.58 per hour as a mechanic's helper when in August, 1948, he saw an advertisement in a trade journal offering employment to experienced pulp mill men (38, 190). He immediately answered it on August 26, 1948 (39 P-1) and enclosed a letter of reference received from the North Carolina Pulp Company (72 P-5).



On September 1, 1948, C. M. Stitt, plant manager of the defendant corporation's San Joaquin Division, answered plaintiff's letter of inquiry and application for employment, stating "based on your experience, we feel that you can be reasonably assured that we will have some position available for you", and that the matter would be referred to M. T. Lindley, who was expected to begin work as pulp mill superintendent for defendant corporation on or about October 1, 1948, and would be charged with the responsibility for hiring crews. An application blank and the letter of reference were returned to plaintiff (41, 42 P-2). Plaintiff filled out the application blank and on September 7, 1948, mailed it to defendant (90 D-A, 93 D-B).

In the afternoon of on or about the 18th day of October, 1948, plaintiff telephoned M. T. Lindley. According to the testimony of the plaintiff, Lindley told him that he had a permanent position for him when the pulp plant opened, that they were pleased with the prospect of hiring plaintiff, that if he wished to come sooner, he would be placed in a temporary position in one of the defendant's mills, and further, that the defendant would reimburse plaintiff any traveling expenses incurred by him and his family. Plaintiff told Lindley that he was employed by the Otis Elevator Company at \$1.58 per hour, that he would give them notice but that he would be in Antioch, California, on the 15th day of November, 1948, with his family, ready to go to work (43, 98-99, 138-139).



Following his conversation with the plaintiff, Lindley on October 18, 1948, dictated a letter, which was dated October 19, 1948, wherein the plaintiff's telephone call was acknowledged and wherein Mr. Lindley said “\* \* \*, if it is your desire to come to the Coast at an earlier date [before actual operations begin at the new mill], we will place you in one of our mills at whatever they may have for you until we begin operating”. As for housing, Lindley said that rentals were critical but that there were “homes available for purchase ranging in price from \$6,500 to \$9,000 (45-46 P-3).

According to the plaintiff, upon receipt of Lindley's letter, he gave notice to the Otis Elevator Company (46) and sold five rooms of furniture of the approximate value of \$2,500 for a sum of from \$800 to \$900 (49-51). On or about November 6, 1948, the plaintiff testified that he answered an ad in a newspaper placed by a party seeking someone who would drive an automobile to Fort Mason, California, in which he came to the Coast with his wife and three daughters, expending \$209.35 for gas, oil, repairs, etc. on the trip (47-48).

Plaintiff arrived in Antioch on the 15th of November, 1948 and reported to Mr. Lindley. He was told that he would be given a position of recovery operator in the pulp mill when it commenced operations. About a week later he was given temporary work at the defendant's Antioch division, doing various jobs at \$1.54 per hour, and for overtime and a half and double time (54-57).

Plaintiff testified that he waited thus for the pulp mill's opening and his inquiries to the management as to when he would be put to work as a recovery operator were constantly met with the promise that it was only a matter of time, until the plant began operations (59, 68-69).

From statements made by Stitt and Lindley, plaintiff learned that the pulp mill had begun operations and was about seventy per cent filled as to employment capacity, and plaintiff insisted that Lindley let him know when he would be put to work in the recovery room. On the 28th day of August, 1949, when this interview took place, Lindley told plaintiff that he was through. When pressed for reasons why, Lindley informed plaintiff that this decision was reached because the management had heard rumors (59-64).

Three days thereafter and on the 31st day of August, 1949, plaintiff was told to report at the San Joaquin Division at 1:00 p.m. Fuller, to whom plaintiff reported, explained that he had learned plaintiff was out of work and could give him a job in the paper mill as broke baler at \$1.425 per hour. Plaintiff told Fuller that he was employed at the Antioch Division earning \$1.54 per hour and further, that the work promised him at the San Joaquin Division was in the pulp mill and not in the paper mill. Fuller replied that he had not been fully apprised of those facts. Plaintiff thereupon returned to the Antioch Division (64-67). By a letter dated September 2, 1949 (57 P-4) plaintiff's employment with defendant corporation was terminated.

On September 3, 1949, a union representative and the plaintiff met with Mr. Stitt. It was Stitt's position, according to plaintiff, that Lindley had no authority to fire him but that the plaintiff had refused to accept employment offered by the defendant corporation's San Joaquin Division. Stitt refused plaintiff's request that Lindley and Fuller be brought in in order to clarify the situation but promised to look into it (69-70).

On November 2, 1949, plaintiff wrote to Stitt, stating that in September and October of 1948 he had been offered employment in the new pulp mill and requested that the promised employment be given him, or the reason for such denial (77-78 P-6). C. M. Stitt's reply to plaintiff's letter was that according to defendant's records, plaintiff had seen fit to turn down the position offered him at the San Joaquin Division on Wednesday, August 31, 1949 (79 P-7).

Plaintiff sought employment elsewhere and for a period of five months worked for the Southern Pacific Company. His earnings totaled \$1,225.75, and incurred expenses of \$25 per week because he had to live away from home, which said expenses totaled an additional \$550. From other employment, plaintiff has earned \$450 to date of trial. He is now employed as a filling station operator in Antioch, at \$50 per week.

The rate of pay for a recovery operator in November, 1948, was \$1.755 per hour, and, according to the evidence, is now \$1.825 per hour (55-56).



**ARGUMENT.****I. AS TO WHETHER NO CONTRACT EXISTED, DUE TO  
UNCERTAINTY AS TO TERMS.**

Practically all the arguments and authorities raised by defendant were fully developed and advanced by defendant to the District Court below.

We do not argue with its contention that a contract must have a meeting of the minds in that in essential terms it must be certain and complete.

Our contention is, and the District Court so found, that this contract was not uncertain. Plaintiff was offered and accepted the position in the pulp mill. Pursuant to the telephone conversation of October 18, 1948, the date the Court found to be the date of the contract, Lindley, the superintendent, told plaintiff that he would be employed in the Recovery Department (138, 196). Certainly both parties understood that plaintiff would be employed in the pulp mill's recovery department; that is why Lindley marked plaintiff's application as he did (138, 139).

The length of time covered by the contract of employment was certain, for the Court found it to be permanent. The strongest evidence against defendant's contention was the testimony of Lindley and Stitt, adduced on cross-examination (131-167, 189-211).

There was no question as to which parties were obligated under this agreement. As to related conditions, e.g. vacations, holidays, overtime, shift premiums, call-in pay, promotions, seniority, etc., they were all matters which would be covered by the



collective bargaining agreement between defendant (employer) and plaintiff (employee), and the appropriate trade union, by which agreement all parties would abide. The evidence is clear that plaintiff had been a union organizer and a member of the craft union covering pulp mill workers, and also that defendant had a collective bargaining contract with the union (188, 193).

There was no aura of mystery surrounding the type of work the plaintiff was hired to do, because anyone familiar with the paper industry (and the parties here were familiar) knows the duties of a recovery operator. The defendant was creating a pool of experienced pulp mill men. From the material sent to defendant by plaintiff prior to the telephone conversation of October 18, 1948, defendant was well aware that plaintiff had had over twenty years' experience in recovery departments. The subject matters indicated in the letter from Stitt to plaintiff (41, 42 P-2) and from Lindley to plaintiff (45-46 P-3) set forth "pulp mill" and "recovery department" as the place where plaintiff would be employed.

The case of *Mason v. Rose*, 176 Fed. (2d) 486 should be read in conjunction with the opinion of Federal District Judge Knox (85 Fed. Supp. 300), which case was affirmed on appeal, for a thorough understanding thereof. The facts are that the plaintiff, who brought suit for declaratory relief under an alleged agreement was "getting pretty much of a raw deal" for a period of from two to three years as a result of the conduct of his employer or partner,

defendant Rose. During that period, neither party had made any contribution to performance of the alleged contract.

The facts of the above case should be distinguished from a case where one or the other of the contracting parties has performed, in whole or in part, the terms of the contract, and who had suffered financial loss or detriment. We believe the Court resorted to Fireside Equity to protect Actor Mason who was being harassed by defendant Rose, his employer.

The facts of the instant case are dissimilar. The plaintiff has already performed his part of the contract by quitting a job. (The fact that this job was temporary is irrelevant and not worthy of all the attention given it by the defendant. Plaintiff states that he could have continued with the firm and had he done so, by the time of the filing of this suit, would have been promoted to the position of a full-fledged elevator mechanic, earning \$2.50 per hour, even though he was a mechanic's helper at the time he forsook it in answer to defendant's beckon.) He further sold his furniture at a financial loss of from \$1,600 to \$1,700 and moved his family to an unfamiliar environment three thousand miles away. Plaintiff is neither young nor irresponsible. He is aware of and does his best to fulfill his responsibility to support his family. Hence, we cannot believe he was indulging a whim or satisfying a latent wanderlust by traveling across most of the continent with his family in tow on the basis of an indefinite, uncertain, and nebulous promise of employment.

The following cases are cited in support of plaintiff's position:

Section 1654 of the Civil Code of California;  
*Payne v. Neuval*, 155 Cal. 46, 50;  
*Weil v. California Bank*, 219 Cal. 538, 541;  
*Ezmirlan v. Otto*, 139 Cal. App. 486, 493;  
*Newby v. Anderson*, 217 Pac. (2d) 69; 97  
 A.C.A. 83 (April 20, 1950);  
*Nuland v. Pruyn*, 216 Pac. (2d) 526; 96 A.C.A.  
 936 (April 6, 1950);  
*Pike v. Hayden*, 218 Pac. (2d) 578; 97 A.C.A.  
 669 (May 17, 1950);  
*Stockton Dry Goods Co. v. Girsh*, 221 Pac.  
 (2d) 186; 99 A.C.A. 14 (August 11, 1950);  
*Arrow Flying Service v. Universal Flyers*  
*Ground School*, 221 Pac. (2d) 231; 99 A.C.A.  
 66 (August 18, 1950).

In each of the foregoing cases, including Section 1654 of the Civil Code, the contract is construed most strongly against the drafter. The contract is construed most strongly against the person who could have made it more definite and explicit. In *Stockton Dry Goods v. Girsh*, *supra*, the Court went further and held that a contract must be construed in such a manner as to make it work.

Who could have made this contract more definite? Are we to believe at this time that defendant's agent Stitt, fortified with his experience in personnel relations, had deliberately permitted an uncertain condition to exist which would provide him a loophole through which he could escape his legal responsibility?



Plaintiff's words and deeds throughout this series of events were said and done in absolute good faith.

We contend that there was no uncertainty.

If by any stretch of the imagination uncertainty can be adduced, the defendant is responsible and was in a position to have remedied it. The situation would be such where the law would hold that the drafter, who could have made the contract more definite, is responsible.

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## II. AS TO WHETHER THE LIABILITY OF DEFENDANT WAS DISCHARGED BY PLAINTIFF'S REJECTION OF AN OFFER OF PERFORMANCE.

To give credence to defendant's argument, it is necessary that we discount the findings of the District Court, which are:

"6. That it is true that when the employment for which plaintiff was contracted became available, defendant corporation refused, and does now refuse, to fulfill the terms of the said contract, and refused, and does now refuse, to employ the plaintiff.

7. That it is true that plaintiff has performed all of the things and matters on his part to be performed under the terms of the said contract and that defendant corporation has wholly failed to perform the things and matters on its part to be performed under the said contract of employment.

\* \* \* (33).

On August 28, 1949, Lindley told the plaintiff that he was "through", and when plaintiff, in compliance



with orders, reported to the San Joaquin Division on August 31, 1950 he was offered a job as a broke baler at the paper mill (plaintiff's qualifications were for pulp mill work) at \$.115 per hour less than he had been paid for his temporary work.

It is plaintiff's contention that Mr. Stitt must have realized the company's legal responsibility to the plaintiff and had sought to rectify the damage caused by the arbitrary action on the part of Mr. Lindley, at the same time making a feeble effort at what might be construed as fulfillment of contract on the defendant's part. The tactic used was to place the plaintiff in the position where he would, by a simple arithmetical process, refuse the offered job and hence be the one to breach the contract.

Defendant's conduct is analogous to that of a hit and run driver. As this Court knows, flight on the part of a criminal suspect is evidence for the consideration of the Court or the jury as an admission of guilt, placing suspicion that he has committed the offense on the one who flees. Defendant's awareness that it had committed a wrong and violated a promise, a clear admission that there was a pre-existing contract, and its attempt to divest itself of its legal responsibility is evidenced by the aforementioned offer to plaintiff of a low-paying menial job, which defendant well knew was not commensurate with plaintiff's qualifications.

### III. AS TO WHETHER THE ALLEGED CONTRACT WAS UNENFORCEABLE FOR LACK OF MUTUALITY.

The evidence showed the contract of employment was permanent and the Court so found. It is not for plaintiff to determine the legal effect of a contract; that is for the Court to determine. If defendant wishes to be bound by plaintiff's opinion, then it should be consistent, confess a judgment on the pleadings, and pay to plaintiff the full amount of the damages in accordance with the complaint.

Both parties could have breached this contract, and if either one did, he should be ready to respond in damages.

It is fallacious to argue that defendant could not have sued plaintiff for a breach of contract while he still resided in Alabama. At that time the contract was a unilateral one. When plaintiff accepted the job offer, came to California, and accepted the benefits of the temporary employment, the contract became bilateral and binding on both parties. The leading case concerning bilaterality in California is *Los Angeles Traction Co. v. Wilshire* (1902), 135 Cal. 654, 658.

Assume that after the conversation of October 18, 1948, the letter by Mr. Lindley of October 19, 1948 had enclosed a check for plaintiff's transportation, and plaintiff had cashed the check but refused to perform, would he not have been guilty of a breach of contract had defendants sued for nonperformance?

The case of *Pike v. Hayden, supra*, decided May 17, 1950, concerns the mutuality of a landlord-tenant

relationship where the lessees were let into possession and the lessors accepted the rents without objection over a period of months, and the Court holds that if there were any lack of mutuality of remedy, such lack was brought about by the lessors.

The same yardstick applies to the case at bar: performance on the plaintiff's part, acceptance of performance by defendant, and its subsequent breach.

In *Arrow Flying Service v. Universal Flyers Ground School*, *supra*, decided August 18, 1950, the lower Court in its interpretation of a pleaded contract sustained the demurrer because it felt that on its face, the contract showed a lack of mutuality. The Court of Appeals reversed that ruling and held that a contract is to be interpreted to give effect to the mutual intention of the parties at the time it was made, citing *Brawley v. Crosby Research Foundation, Inc.*, 73 Cal. App. (2d) 392, 397.

“Lack of mutuality is tantamount to want of consideration, and where, as in this case, sufficient consideration is otherwise present, mutuality is not essential. It becomes essential only when its absence would leave a party without a valid or available consideration for his promise.”

The consideration given by plaintiff has been repeated many times. Further repetition is unnecessary.



**IV. THE ALLEGED CONTRACT WAS ENFORCEABLE AND WAS NOT TERMINABLE AT THE WILL OF EITHER PARTY.**

Relying on defendant's promise that he would be given a permanent position in its pulp mill which was to open in the near future, plaintiff quit a job paying \$1.58 per hour, sold his furniture at a loss of \$1,600.00 and removed his family from Tuscaloosa, Alabama, to Antioch, California.

In *Seifert v. Arnold Bros., Inc.*, 138 Cal. App. 324, the plaintiff entered into a conditional sales contract to buy an automobile from defendant. In consideration for said purchase, defendant agreed to give plaintiff employment as evidenced by a letter, as follows:

“\* \* \* In consideration of your purchasing an Essex coupe, we are offering you employment at the rate of \$80 per month. This employment is to be steady as long as your services are satisfactory.” (P. 325.)

After three months, plaintiff, along with other employees, was discharged because of bad business conditions. (This was during the last depression.) The trial Court found that plaintiff had performed his work properly and he had not been employed for a reasonable period, and entered judgment in plaintiff's favor. The Appellate Court affirmed the judgment and held as follows:

“The employment was in consideration of the purchase of an automobile from appellants and [that] the rule is clear that the employment could only be terminated under conditions which render it reasonably just and proper to do so.” (P. 326.)



In *Millsap v. Natl. Funding Corp. of Calif.*, 57 Cal. App. (2d) 772, the plaintiff gave up a job paying \$90 per month and went to work for the defendant for a reasonable length of time, at a beginning wage of \$100 per month, to be increased at the end of two months to \$110. The trial Court found that plaintiff had been discharged without cause and found two years to be a reasonable period of employment. The damages were calculated on this basis. The plaintiff testified at the trial that she would not have quit her job had defendant not offered her a permanent job. The appeal Court's holding, at page 776, was as follows:

“In view of the recognized definition of consideration, codified in section 1605 Civil Code, which makes any prejudice suffered or agreed to be suffered by the promisee as an inducement to the promisor, which the promisee is not legally bound to suffer, good consideration for a promise, it is hard to follow the reasoning of those cases from other jurisdictions which hold that the giving up of other employment cannot afford sufficient consideration for a promise of permanent employment. Where the prospective employee clearly states to his prospective employer, as in the case before us, that he will not give up his present employment unless the prospective employer will agree to give him permanent employment and the prospective employer expressly agrees to those terms, it seems clear that the prospective employee (to paraphrase the language of section 1605 of Civil Code) in giving up his present employment suffers a prejudice as an inducement to the promisor for his promise of permanent employment. ‘It is not necessary

to the existence of a good consideration that a benefit should be conferred upon the promisor. It is enough that a "prejudice be suffered or agreed to be suffered" by the promisee.' (6 Cal. Jur. 171.) We therefore hold that there was sufficient consideration for the promise of permanent employment (construed by the court in this case as employment for a reasonable period) in accord with the rule laid down in the following cases: \* \* \*

The case of *Thacker v. American Foundry*, 78 Cal. App. (2d) 76, cited by appellants in its brief, is not in point, for the Court, at page 84 said as follows:

"\* \* \* In the first place, neither the pleadings nor the findings make mention of a failure to continue plaintiff's employment for a reasonable time, nor that the term of approximately one year and three months during which plaintiff was so employed was not for a reasonable time. \* \* \*

An examination of the facts of the case at bar reveals that the employer (defendant) was in dire need of experienced and qualified workmen for its new pulp mill plant that was about to open. These workmen were needed so badly that defendant placed an advertisement in a paper trade journal, giving its reply address as "Box 24, Southern Pulp & Paper Manufacturing; 75 Third Street, N. W.; Atlanta, Georgia." (39 P-1, 190-193.)

Defendant's eagerness is best evidenced by the fact that plaintiff's letter, dated August 26, 1948, was answered by Stitt immediately (letter dated Septem-

ber 1, 1948) (41 P-2). Why no less a personage than the plant manager himself should devote personal attention to the routine matter of answering an application is brought out by Mr. Stitt's testimony to the effect that the defendant corporation at that time desperately needed three hundred qualified workmen. Hence, the plaintiff was the answer to defendant's prayer and an extremely desirable prospective employee.

We therefore have every right to assume that when Lindley entered upon his job on October 1, 1948, he was briefed by Stitt personally about the plaintiff since Stitt had handled the original correspondence. Lindley's reaction to Townsend's (the plaintiff's) telephone call is the best indication of the above assumption. By Lindley's own testimony, we know that he went to the personnel office and dictated the letter to be sent to plaintiff (45-46 P-3) not trusting his personnel manager, Gordon McCuish, to take care of the matter. *Why?* Because plaintiff was too valuable a man to let slip through defendant's fingers at the time, and it is our contention that the plaintiff was a "fair-haired boy" until defendant realized he was "too good a union man".

The above discussion is necessary in order to determine what actually transpired since the testimony of defendant's employees does not coincide with the plaintiff's at crucial points. This District Court has a right and a duty to reach a conclusion from all the evidence as to what really happened in view of all the surrounding facts and circumstances.



In evaluating the circumstances, the District Court must have taken into account the plaintiff's economic insecurity as against the defendant corporation's wealth and economic strength. This was not for the purpose of "soaking the rich and giving it to the poor" but for the sole purpose of examining the motive behind defendant's acts. Reasonable men can reasonably conclude that the employer (the defendant) considered the plaintiff an excellent "catch" when the plant manager sent plaintiff (a prospective employee) a personal letter and then followed up a telephone conversation with a letter to "cinch the deal" (45-46 P-3).

It is illogical to assume that a workman would quit a job paying \$250 or more a month in his own environment, sell his furniture at a loss, uproot his entire family, leave his home like a "pack rat" and travel over half the continent unless he had actually and definitely been assured of permanent life employment with a new growing industry.

Certainly it would have been wiser had plaintiff employed an attorney and protected himself in every detail before "pulling up stakes", but the Court cannot and should not penalize this plaintiff for having had faith and confidence in the words, deeds, writings, and essential integrity of the defendant corporation's agents, servants, and representatives, and for having believed that permanent lifetime employment in a field in which he was experienced was his, and which in addition offered him an opportunity to own his own home.



## V. THE STATUTE OF FRAUDS IS NOT APPLICABLE.

Our contention is that the written evidence is sufficient to constitute a contract, and we have already referred to the extent of parol evidence that is permitted in the event of ambiguity or uncertainty.

Since defendant raises the question of the Statute of Frauds, we will examine that for its applicability to the case at bar. We might point out at the outset that said statute does not apply under more than one consistent theory, and for this limited purpose assume that there was no writing at all.

### First theory.

An oral contract capable of being performed within a year is not within the statute, though by its terms it is not to be performed within a year. (See *Columbia Pictures Corp. v. DeToth*, 87 Cal. App. (2d) 620, 631-635. Also 49 *Am. Jur.*, 387, sec. 25, and page 391, secs. 29 and 30.)

The Court is familiar with the legion of cases, especially employment cases, which have ruled that the terms "for life", "forever", or, as in the instant case, "permanent", are construed to mean that the contracts could be performed within a year, even though the relationship exists over a period of years. Death could and can intervene at any time is the theory followed. (See Sections 51 and 58 of 49 *Am. Jur.*, 409, which clearly spells this out.)

### Second theory.

The Court is familiar with the estoppel doctrine where the application of the statute would result in a

fraud and would inhere in the resultant unconscionable injury from denying enforcement of a contract after one party has been induced to change his position seriously by the other party in reliance on the contract, or where fraud inheres in the unjust enrichment of a party who has received the benefits of another's performance, were he allowed to rely on the statute.

The Court is familiar with *Seymour v. Oelrichs*, 156 Cal. 782 and the subsequent cases. Many Courts have mistakenly limited the application of the doctrine of the *Seymour* cases to only those cases where the promisor promised a contract in writing, but the recent decision in *Monarco v. LoGreco*, 220 Pac. (2d) 737; 35 A.C. 669 (August 1, 1950) wherein, after a scholarly discussion of the law, Justice Traynor holds that a promise to make a written contract is not necessary when the unconscionable injury is present.

### **Third theory.**

The law applicable to a written memorandum against the party to be charged is clearly applicable here. A discussion thereof is unnecessary.

### **Fourth theory.**

Part performance by the party seeking to enforce the agreement removes the parol agreement from the category of actions covered by the Statute of Frauds (49 *Am. Jur.* 427, 436, 471).

**CONCLUSION.**

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,  
February 29, 1942.

C. K. CURTRIGHT,  
CHARLES R. GARRY,  
*Attorneys for Appellee.*





No. 13,141

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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FIBREBOARD PRODUCTS INC.,  
a Corporation, et al.,

*Appellant,*

vs.

W. H. TOWNSEND,

*Appellee.*

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Reply Brief of Appellant Fibreboard Products Inc.

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**Reply Brief of Appellant Fibreboard Products Inc.**

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We have stated the essential facts of the case in our opening brief and therefore take issue with plaintiff's statement of facts only in the course of the ensuing argument.

**I. NO CONTRACT EXISTED DUE TO UNCERTAINTY AS TO TERMS.**

We have cited many cases to the effect that the terms of a contract must be certain and definite or the contract is not enforceable, with which plaintiff does not disagree. The issue then becomes a factual one. We have shown that there

is no evidence that the parties agreed to the employment of plaintiff on October 18, 1948. The finding of the District Court on that issue is contrary to the evidence. There could be no contract of employment on that date for there was no agreement on the job which was the subject of the contract. That uncertainty is fatal to plaintiff's case.

The only evidence of a possible agreement on a particular job was plaintiff's testimony relative to November 15, 1948, and at that date there could be no consideration for a promise by the defendant and the most that could have resulted would have been a relationship terminable at will. Plaintiff had to persuade the District Court the contract was entered on October 18 in order to justify a finding that the alleged agreement was not terminable at any time. This aspect is referred to later and we will proceed to analyze plaintiff's explanation of the lack of evidence to support the finding of the trial court.

Plaintiff's brief, despite petty distortions and misstatements, has been unable to demonstrate any proof of the definite terms of the contract the District Court found.

In the third paragraph of page 10 of the brief it is stated plaintiff was offered and accepted "the position in the pulp mill." That assertion is meaningless for there were many positions in the pulp mill and even the plaintiff stated none was specified until November 15th, after he had moved to California and about a month later than the date the District Court found a contract to have been entered (95, 96-7).

In the same paragraph it is asserted that, pursuant to the telephone conversation of October 18, Lindley told plaintiff he would be employed in the recovery department. The assertion is not true and the pages cited in support

of the assertion (138 and 196) may be searched in vain for proof of it. Even if the assertion were true, it does not specify which of the many jobs in the recovery department was intended.

The classification of plaintiff's application in defendant's records is not evidence of a contract. That act was something plaintiff had no knowledge of and Lindley was unable to state whether it was done before or after the October 18 telephone conversation (138). Lindley merely marked the application for a likely department from the standpoint of his experience. Again we point out the vast difference between a *department* and a specific *job*.

When plaintiff's brief progresses to the second paragraph of page 11, the job of recovery operator is first mentioned, but the reference to the evidence later in that paragraph again falls back upon the generalizations of "pulp mill" and "recovery department." The generalizations of the brief do not supply the evidence which is absent from the record.

The plant in question is composed of three main parts—a pulp mill and a paper mill and a wood room (113). Mr. Stitt further subdivided them as pulp mill, board mill, wood mill, maintenance, power and office (212). The total number of jobs is 400, of which 70 are in the pulp mill (193, 212). The pulp mill has, as one of its departments, a recovery department. In the recovery department are many individual jobs (221), such as digester cook, evaporator operator, tour foreman, board machine operator and so on. General reference to the subdivision pulp mill or to the department called recovery department are not references to a specific job. Discussion of a place where a per-

son might be employed is not the equivalent of an agreement to employ in a specific job.

Plaintiff has attempted to minimize the decision in *Mason v. Rose*, 176 F.2d 486, by accusing the 2nd Circuit Court, one of the most respected courts in the nation, of perverting the law: resorting to "Fireside Equity." Plaintiff would also distinguish the case, asserting that nothing was done under the alleged Rose-Mason contract. On the contrary, it appears from the opinion of the lower court that Mason came to the United States from England and could not get employment for a long time because of the existence of the alleged contract. The case is not to be explained away. It is excellent authority for the rule that an employment contract must be definite and certain in order to be valid and enforceable.

Plaintiff next goes all out for a proposition that is beside the point, i.e., that a contract is construed most strongly against the drafter. (Eight of the cases cited by plaintiff support this irrelevant argument.)

It seems quite clear that before a contract can be construed against its drafter there must be a contract to construe. Where is this contract? What are its terms? We have already shown that it is missing its indispensable subject matter, namely, the job in which defendant was supposed to hire plaintiff, and lacking in all of its essential terms except the forlorn claim that the duration was "permanent."

The power to construe a contract cannot be stretched to include supplying essential terms that the evidence shows were not agreed on. This alleged contract died aborning and there is nothing to construe.



Even if the rule plaintiff urges were in fact applicable, how would it be applied? Did not the plaintiff himself write the first letter on August 20 and apply for "one of the jobs" at the new plant (39, p. 1)? Against whom but the plaintiff is that ambiguity to be construed?

Did not the plaintiff write a second letter on September 7 in which he stated he would appreciate "any job you people have to offer me" (90 D-A)? Against whom is that uncertainty to be construed?

Did not the plaintiff draft both those letters?

Did not the plaintiff file an application which stated, as to kind of work desired, "pulp mill tour foreman" (93 D-B)? The evidence shows that tour foreman is not the same job as recovery operator. Against whom then is that document to be strongly construed?

Plaintiff posed the rhetorical question of who could have made this contract more definite. The answer is quite plain that he could have. But he knew very well that he was not contracting for a job in that correspondence. He was just negotiating. Neither his correspondence nor the defendant's amounted to anything more than that. Belaboring the letters to make them seem something they are not cannot supply the proof of an agreement between the parties as to any definitely ascertainable employment.

This plaintiff has testified unequivocally that the job of recovery operator was never mentioned until after he arrived in California and that he then selected the job when he was offered his choice (95, 96-7, 54, 55). This occurrence, according to plaintiff's own testimony, was on November 15, nearly a month later than the date when the District Court found that agreement on the recovery operator job had been reached.

It is clear and unmistakable that these parties simply had not agreed on employment of the plaintiff when he undertook to move himself to the place where the plant was being built. The contrary findings of the District Court are without basis in the evidence and are contrary to the evidence.

We have shown that plaintiff's correspondence does not mention the job of recovery operator. We have also shown that defendant's letter of September 1 (41 P-2) cautioned plaintiff that the company was making no commitments, and the letter of October 19 (45 P-3) advising plaintiff that he might have *temporary* work, made *no mention* of *permanent* employment. It had as its subject a phrase which would clearly illumine the mind of a reasonable man to the fact that it was not a contract of employment:

"*Possibility of Employment in Recovery Department*" (emphasis supplied).

The only *certain* thing in the exchange of correspondence is that the parties had *not* agreed to plaintiff's employment. That is made doubly clear when the letters are read in connection with plaintiff's testimony of the conversation of October 18:

"Q. (By Mr. Holmes): When did Mr. Lindley say anything to you about the job as recovery operator?"

A. On the 15th of November.

Q. He didn't say anything about the recovery operator's job in your telephone conversation?

A. No, sir; he told me Mr. Stitt had given him my recommendation from the North Carolina Pulp Company and my application for employment and it seemed I was an experienced Kraft pulp mill man.

Q. He didn't promise you any particular job at all?

A. That's right.

Q. You didn't know what it would be?

A. Presumably it would be a tour foreman's job. That was the last job I had.

Q. Which was what you applied for?

A. Yes, sir.

Q. That is what you wanted?

A. That is what I wanted.

Q. He didn't promise you that or any other job on October 18th. [73]

A. No, sir; he just told me if I would come down they would place me in one of the other mills until such time, and that I could work in that until it was open, and I could stay here and the company would help me buy a home if I wasn't able to buy one." (96-7)

## **II. LIABILITY OF DEFENDANT WAS DISCHARGED BY PLAINTIFF'S REJECTION OF AN OFFER OF PERFORMANCE.**

Plaintiff has admitted that he was offered a job at the plant on August 31, 1950 (should read 1949) (Brief, p. 15). We have asserted that, since no specific job was ever agreed to, that offer, which was rejected, discharged any obligation to him. Plaintiff's attempt to find an admission of responsibility in that offer is without merit and the analogy to criminal law is not worthy of reply. Our assertion stands unrefuted.

## **III. THE ALLEGED CONTRACT WAS UNENFORCEABLE FOR LACK OF MUTUALITY.**

The plaintiff seeks to meet our argument on lack of mutuality by twisting this case into a unilateral contract which became bilateral. Plaintiff misses the point. The lack of mutuality lay in the absolute right reserved by plaintiff to quit at any time. He did not bring himself



within the theory of the case of *Brawley v. Crosby Research Foundation*, 73 C.A.2d 302, for in that case 60 days' notice of termination was required and the defendant had to pay minimum royalties during that period. The theory of mutuality and consideration in that type of case has no applicability where no notice of termination is required and the power to end the alleged agreement at any time is absolutely reserved. If there is a requirement to perform during a stated period before the termination notice becomes effective, both mutuality and consideration are present. However, when the unconditional power to terminate at will is reserved, the difference between mutuality and consideration is clear. Consideration is present so long as the person performs, but mutuality is never present. Under plaintiff's theory here defendant was supposed to be bound permanently, but plaintiff was to be bound only so long as he chose to be and there is not even the requirement of reasonable notice to give a semblance of mutuality. The law does not enforce such contract.

In the matter of *Pike v. Hayden*, 97 C.A.2d 609, the only thing lacking was the formal written lease, which the lessor himself had withheld; his own default could not give rise to the defense of lack of mutuality. Here the terms of the contract are not proved and the right of plaintiff to end the alleged agreement at any time is established by his own testimony, elements which were not raised or considered in the *Pike* case.

Our argument on this phase of the case is supported by a number of well-considered cases which plaintiff has ignored. We need not repeat the application of the sound principles they stand for; it is sufficiently discussed in our



opening brief and is neither refuted nor distinguished by plaintiff.

**IV. THE ALLEGED CONTRACT WAS FOR AN INDEFINITE TIME AND WAS UNENFORCEABLE AS IT WAS TERMINABLE AT THE WILL OF EITHER PARTY.**

Plaintiff asserts that the alleged contract in this case is within the exception to the rule that contracts of employment for an indefinite period are terminable at the will of either party. It is claimed that there was consideration, as in *Seifert v. Arnold Bros. Inc.*, 138 C.A. 324, and in *Millsap v. Natl. Funding Corp.*, 57 C.A.2d 772. The narrow field of those cases is stated at 57 C.A.2d 776 to be the situation "where the prospective employee clearly states to his employer \* \* \* that he will not give up his present employment unless the prospective employer will agree to give him permanent employment and the prospective employer expressly agrees to those terms \* \* \*"

This plaintiff gave up a temporary job which would have expired in a week or two. *Thacker v. American Foundry*, 78 C.A.2d 76, at 85, shows that to be insufficient consideration to come within the *Millsap* doctrine. That the giving up of employment held only at will is of no legal significance is discussed below in connection with *Ruinello v. Murray*, 36 C.2d 687, on the statute of frauds issue.

Plaintiff has attempted to show his great bargaining power in getting defendant to make the alleged promise to him by distorting the importance of certain facts. For example, Stitt, the manager, answered his letter. But Stitt had nothing to do at the time but send out form letters to applicants, for the plant was far from built and he had no one to do it for him (208-9). Contrary to plaintiff's asser-

tion, defendant did not need any men desperately, let alone 300. The evidence showed that only 25 out of 68 in the pulp mill were to be hired from out of the area (146-7) and, when plaintiff first wrote, the plant opening was not expected for six months. In answering this part of our argument plaintiff passes on to foolish and exaggerated assumptions which are without basis in the evidence and required no discussion.

No reasonable man could believe that a contract of employment was agreed to in the exchanges of correspondence exhibited in this case, but plaintiff's eagerness to get at the head of the line when the new plant opened led him to move to California. He speculated he could have gone to North Carolina with his last employer, but that speculation has no evidentiary value. An express contract of employment must be shown by something more than deductions and conclusions of the witnesses. *Townsend v. Flotill Products, Inc.*, 82 C.A.2d 863, 866. His history is entirely consistent with his action in moving to California. He was not rooted anywhere and had no prospects where he found himself in 1948. The facts show that, at the time he first wrote to defendant, he was working as a helper on an elevator construction job which lasted three months. Prior to that job he had spent three years in about eight short-term jobs in several industries (no pulp or paper mills) in several different states. He had worked in a pulp and paper mill from 1928 to 1935 and from 1937 to 1945. By 1948 he had not been in the industry for three years and had not operated machinery as a worker since 1940 (86-90, and 94, D-B).

Plaintiff hurriedly departed for California even though he knew that no particular job was discussed in his telephone conversation and none was mentioned in the letter he received after that. In view of those facts he could not have been induced to move to California by any prospect of a job as recovery operator. He moved at his own risk and on his own speculation. Therefore his move could not be consideration sufficient to place the alleged agreement in the exception to the rule that indefinite term contracts are terminable at will. On November 15, when, plaintiff testified, he selected the job of recovery operator, he was just another volunteer appearing at the plant and there was no consideration for any promise on that date. If migrating to California from Alabama could be considered a detriment, which we doubt, it was one voluntarily undertaken by the plaintiff and not a result of any promise of a job as recovery operator.

We submit that the general rule applies here and, no contract having been entered upon a consideration, the relation of the parties was terminable at any time, even before employment began. The facts are very similar to *Standing v. Morosco*, 43 C.A. 244, where the plaintiff ended employment in another state and moved to California and the court found there was no enforceable contract.

## **V. THE ALLEGED CONTRACT IS UNENFORCEABLE DUE TO THE STATUTE OF FRAUDS.**

The statute of frauds raises problems which plaintiff has not even tried to answer.

In the first place the requirement of an adequate memorandum setting forth the essentials of the agreement,



signed by the party to be charged, is not met. We have already discussed the only writings in this case and their inadequacy to show the terms of a contract. It is sufficient merely to refer to *Ellis v. Klaff*, 96 C.A.2d 471.

Plaintiff cited *Columbia Pictures Corp. v. DeToth*, 87 C.A.2d 620, for a proposition it does not stand for. To be outside the statute of frauds, an oral contract must be capable, by its terms, of being performed within a year. If by its terms it is not to be performed within a year, it is within the statute. Plaintiff has not shown, and cannot show, how a contract for two years' employment can be performed in a year.

Plaintiff argues that death could intervene within a year and thus a contract for permanent employment would be fulfilled. Plaintiff fails to take into consideration the difference between employment "for life," and "permanent" employment. Employment "for life" is subject to the contingency of death and the happening of the contingency would provide full performance. "Permanent" employment, on the other hand, is not a contract upon a contingency. Death merely excuses full performance. It is an excuse for non-performance; it is not performance of the contract.

The blunted legal reasoning of some courts has failed to recognize this distinction, but it is sound and is recognized even by the text plaintiff relies on (American Jurisprudence). See 49 Am. Jur. 410. Plaintiff referred to Section 51 of the article on statute of frauds in that volume, but apparently failed to read Section 52. The last sentence of the latter section states that the cases relied on for plaintiff's view "are no longer regarded as of controlling effect." It is to be further noted that in none of the old cases sup-



porting plaintiff's view is there a finding, and state decisions to support such finding, that "permanent" means two years, as was found by the District Court on the authority of the *Millsap* case.

The alleged contract that plaintiff sues on was, according to his contentions and according to the finding of the District Court, a "permanent" contract and it was further found that "permanent" means two years. Therefore, the object to be accomplished by the alleged contract could not have been completed within one year and the statute applies.

Plaintiff next urges that the statute does not apply due to some estoppel. The application of the rule is not developed in the brief, making it difficult to answer the assertion, but we respectfully point out that the District Court was not persuaded that any estoppel was involved in the case for it made no finding thereon. The complete answer to plaintiff's argument on estoppel is contained in the decision of the Supreme Court in *Ruinello v. Murray*, 36 C.2d 687, 227 P.2d 251. It is apparent that the looseness of some courts in finding an estoppel is not in accordance with the law as viewed by the California Supreme Court.

The facts here do not show any unjust enrichment of defendant through a failure to hire plaintiff as recovery operator or any unconscionable injury, and the District Court found none. The job plaintiff thought he might have continued by moving to North Carolina is not a sufficient detriment under the *Ruinello* case. The special damages plaintiff sought were not the result of any unconscionable injury for the District Court specifically found they were not promised him. (See Order for Judgment, 30.) Plaintiff's

move to California took place after his receipt of a letter which promised at most temporary employment and he was not induced to move by any promise of a permanent job. If the migration could be considered an injury, it did not result from defendant's representations. It is to be noted in this connection that "unconscionable injury" must be substantial injustice and not the slight detriment which might be sufficient as consideration for a promise. The facts both as found by the District Court and as disclosed by the evidence do not support an estoppel to plead the statute. It is a complete defense.

At this point in his brief plaintiff raised again the irrelevant issue disposed of above concerning construction of a written instrument and then suggested that part performance removes the alleged contract from the operation of the statute. We are unable to see in the citations in the brief any support for this argument. Plaintiff ignores the California cases directly on the point, which establish the law diametrically opposite to his argument. Part performance of an employment contract does not render the contract valid and enforceable. Even *Seymour v. Oelrichs* recognized that. See 156 C. at 793. The principle is recognized again in the *Ruinello* case for the plaintiff there had quit what he alleged was a "permanent life-time position" and had worked in the service of the defendant and he still could not state a cause of action for breach of contract.

If there ever was an employment "contract" to which the statute of frauds should be applied, this is the case. The makeshift of stray fact and active fancy pieced together by the loquacious aggressiveness of this plaintiff (only faintly revealed in cold type) is just what the statute

of frauds was designed to protect against. The play upon sympathy, the demagogic comparison of the economic circumstances of the parties, the hyper-imaginative imputations of evil motives to defendant's employees, displayed in plaintiff's brief, all exemplify reasons for the existence and operation of the statute. The statute of frauds was meant to protect against such claims as this plaintiff's and this Court should unhesitatingly apply it. The alleged contract fails to meet the standards set by law and is invalid and unenforceable.

## **VI. CONCLUSION.**

We have demonstrated herein and in our opening brief that no contract, oral or written, was entered between these parties, for the subject of the contract, the job plaintiff claims he was hired for, was never agreed upon. There is absolutely no evidence that they agreed on October 18, 1948, that he would be employed as a recovery operator.

The written documents fail to meet the requirements of the statute of frauds and plaintiff has not shown that that statute does not apply.

Even were the plaintiff able to meet these two issues successfully his action would still fail for he has shown no excuse for his failure to accept an offered job and any alleged contract would lack mutuality and would be terminable at will without liability.

This Court should reverse the judgment upon any of these grounds for each is sound and well-supported, but primary among them is the failure of proof that any contract was entered.

The judgment of the District Court should be reversed and that Court should be directed to enter judgment for defendant for its costs.

Dated: San Francisco, California, March 10, 1952.

Respectfully submitted,

T. R. MEYER,  
SAMUEL L. HOLMES,  
BROBECK, PHLEGER & HARRISON,  
*Attorneys for Appellant*  
*Fibreboard Products Inc.*



No. 13,141

IN THE

United States  
Court of Appeals

For the Ninth Circuit

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FIBREBOARD PRODUCTS INC.,  
a Corporation, et al.,

*Appellant,*

vs.

W. H. TOWNSEND,

*Appellee.*

---

Petition of Appellant Fibreboard Products Inc.  
for Rehearing

---

T. R. MEYER,  
MOSES LASKY,  
SAMUEL L. HOLMES,  
BROBECK, PHLEGER & HARRISON,  
111 Sutter Street,  
San Francisco 4, California,  
*Attorneys for Appellant  
Fibreboard Products Inc.*



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No. 13,141

IN THE

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For the Ninth Circuit

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FIBREBOARD PRODUCTS INC.,  
a Corporation, et al.,

*Appellant,*

vs.

W. H. TOWNSEND,

*Appellee.*

---

**Petition of Appellant Fibreboard Products Inc.  
for Rehearing**

---

Appellant Fibreboard Products Inc. respectfully petitions for a rehearing of this Court's decision of February 2, 1953.

The opinion of Judge Harrison holds that the contract is not of a kind falling within the Statute of Frauds. But that is not the decision of the Court on this vital point, because the opinion of Judge Pope, concurred in by Judge Healy, holds that the contract is one falling within the Statute.

The majority opinion then holds that despite the fact that the contract does come within the Statute of Frauds, appellant is estopped to rely on the Statute. The basis of the

alleged estoppel is important, in perceiving what we respectfully submit is the clear error in the decision. The basis of the estoppel, according to this court's decision, is that appellee changed his position in reliance upon an oral promise of appellant.

The Court's opinion is clear and specific as to both elements in this supposed estoppel—(1) what the oral promise was, and (2) what the change of position was.

The change of position, as clearly stated in the opinion, is that appellee gave up a job in Alabama and removed himself and his family to California.

In order for this to be in reliance on a promise, it would have had to occur after the promise was made, not before. But what was the alleged promise? The promise is said to be the oral contract of employment, which would have been wholly valid and enforceable as a contract but for the Statute of Frauds.

Thus, the majority opinion states:

“The facts here found disclose that Townsend was induced by Fibreboard seriously to change his position *in reliance on the promises which made up the contract*, and now to deny enforcement of the contract would result in unconscionable injury to the appellant.”  
(Opinion, p. 6)

The legal rationale is that the Statute of Frauds, the one obstacle to enforcement of the contract, is removed by the element of reliance.

But the facts do not support the application of this doctrine here. The Court's opinion makes clear that there was no such contract until *after* appellee had come to California. Thus, the opinion of Judge Harrison succinctly states—and Judges Pope and Healy concur—that

“\* \* \* the contract of employment was not made sufficiently specific to be enforceable until the conversation of November 15, 1948 \* \* \*” (Op., 3)

This conversation occurred *after* appellee had come to California. At the time appellee presented himself to appellant in California on November 15, 1948, appellee admittedly had no contract.

On the face of the opinion, then, this is not a case coming within the rationale of the estoppel principle upon which the majority opinion rests itself. The acts said to constitute reliance on a contract could not have been such, for there was no contract. No California decision has ever held that reliance on a promise can create an estoppel to set up the Statute of Frauds when the promise falls short of being a legal contract, not merely because of the Statute of Frauds, but because of other vital deficiencies as well.

On the contrary, the very case which the Court relies upon in its decision for the rule of estoppel, *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 P.2d 737, shows it to be the law of California that, to work an estoppel against the application of the Statute of Frauds, the changes of position must have occurred in reliance upon a prior promise forming part of a contract which was complete, at or before the time the changes in position occurred, in every respect but failure to be in writing. Earlier cases also demonstrate this to be the law.

Thus, the part performance by a lessee which precludes assertion of the plea of the Statute of Frauds must occur while the lease is in effect and not simply in anticipation of a promised extension. *Paul v. Layne-Bowler Corp.*, 9 Cal. 2d 561, 71 P.2d 817.

Perhaps it may be countered that this Court relied on another supposed change of position, namely, in the words of Judge Harrison, that appellee “\* \* \* worked for nine months at an inferior job \* \* \* pursuant to an express understanding that he would do so as a part of his arrangement for a permanent job.” (Op., 4)

We do not believe that the Court included this item as an element of the estoppel, because otherwise the Court would have been finding a fact in contradiction to an express finding of the Trial Court, whose judgment it affirms, and this would have been in excess of its functions as an appellate court.

What the Trial Court found was that “\* \* \* pending the opening of the defendant’s paper pulp mill, said defendant would *endeavor to find* other employment for plaintiff.” (Tr., 32) As this Court has said (*De La Rama SS Co. v. Peirson*, 174 F.2d 84 (per Pope, J)), statements of this character fall far short of a contract. (Cf. fn. 1, p. 86) No finding of the Trial Court states directly or by any inference that appellant ever promised that prior to the completion of the pulp mill it would employ appellee for any period or in any capacity, or that acceptance of temporary employment by appellee for appellant at another job was a prerequisite or condition of any later employment at the pulp mill.

The Trial Court made no findings on the issue of estoppel. It found that the several acts of appellee which this Court holds constitute estoppel to rely on the Statute of Frauds simply constituted consideration sufficient to take the case out of the rule that a contract of employment for a reasonable time is terminable at will.



The record in this case *presents the very situation for which the Statute of Frauds was designed*. The finding of the oral promise here depends solely upon the uncorroborated testimony of appellee concerning the statements alleged to have been made in an office interview in California on November 15, 1948, after the change of position. Let it be assumed that this promise was made, as the Trial Court found; the Statute of Frauds always does assume that there is sufficient evidence to support a finding that a contract was made, but nevertheless refuses to let it be enforced because of the possibility of fraud. Such is its very purpose and reason.

To recapitulate, and to point to the precise error in misapplying California law, we submit that the Court overlooked the distinction between two different doctrines, one having to do with what will constitute a contract, and the other having to do with what will constitute estoppel to rely on the Statute of Frauds where a contract otherwise exists. More specifically, there is a principle that certain detriments may serve as contractual consideration which, when added to the promise to render services, can take a case out of the rule that a contract for permanent employment is terminable at will; there is another principle that a serious change of position in reliance on a contract can produce an injury unconscionable enough to estop the plea of the Statute of Frauds.

Where the first principle applies, the contract becomes mutually binding by reason of the acts which constitute the detriment. But under the second doctrine (from the *Monarco* case), the acts of detriment, i.e., the acts in reliance on a contract, must be performed after the contract goes into effect and while it is in effect.

We submit that in order to conform to California law a rehearing should be granted and that the judgment of the Trial Court should be reversed.

Dated: February 27, 1953.

Respectfully submitted,

T. R. MEYER,  
MOSES LASKY,  
SAMUEL L. HOLMES,  
BROBECK, PHLEGER & HARRISON,  
*Attorneys for Appellant*  
*Fibreboard Products Inc.*

**CERTIFICATE OF COUNSEL**

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

SAMUEL L. HOLMES.

ser vol. 2733  
No. 13143

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United States  
Court of Appeals  
for the Ninth Circuit.

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SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a Corporation,

Appellant,

vs.

LESTER W. HURLEY,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

FILED

JAN - 9 1952

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK





No. 13143

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United States  
Court of Appeals  
for the Ninth Circuit.

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SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a Corporation,

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Southern District of California,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Kansas City, Mo.





In the District Court of the United States for the  
Southern District of California, Central Division

Civil Action No. 5187 WM

LESTER W. HURLEY,

Plaintiff,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a Corporation,

Defendant.

DEFENDANT'S MEMORANDUM OF  
POINTS AND AUTHORITIES

Pursuant to order for pre-trial hearing herein,  
defendant submits herewith its memorandum of the  
points of law and the authorities in support thereof  
upon which it intends to rely at trial:

I.

The judgment of the United States District Court  
in Kansas is not res judicata and does not affect  
the rights of defendant in the present action.

Federal Rules of Civil Procedure,  
No. 19-B.

## II.

The payment by defendant of the dividends accruing to one of the several joint owners of the stock discharged defendant's liability to all of said owners.

California Civil Code,  
Sec. 1475.

Cober vs. Connolly,  
20 Cal. 2nd, 741, at 744.

Delano vs. Jacoby,  
96 Cal. 275, at 278. [21\*]

## III.

In any event, plaintiff is barred by the statute of limitations from recovering dividends paid on the stock described in Paragraph IV of the complaint more than two years prior to the filing of his action; and as to the dividends on the stock described in Paragraph V, he is barred as to any dividends paid more than four years prior to the filing of his action.

Perkins vs. Benguet, etc.,  
55 Cal. App. 2nd, 720 at 770.

## IV.

Plaintiff is not entitled to the recovery of interest on any sum prior to the date of his demand upon defendant for payment thereof.

Perkins vs. Benguet, etc.,  
55 Cal. App. 2nd, 720 at 765.

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\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

V.

The failure of plaintiff, after demand to pursue his rights against George E. Burton and the Estate of Elizabeth J. Price, deceased, exonerates this defendant from liability.

California Civil Code,

Sec. 2831.

California Civil Code,

Sec. 2845.

VI.

Plaintiff never became the owner of, and thus entitled to dividends on, any of the stock described in his complaint, because there was no delivery thereof to him by the purported donor, Elizabeth J. Price.

California Civil Code,

Sec. 1147;

Bishop's School vs. Wells,

19 Cal. App. 2nd, 141.

Respectfully submitted.

FULCHER & WYNN,

By /s/ HAROLD G. WYNN,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 11, 1946. [22]

[Title of District Court and Cause.]

### STIPULATION RE RETRIAL

Now on this 13th day of March, 1951, it is stipulated and agreed in the above-entitled cause by and between respective counsel for Plaintiff and Defendant that:

1. For the purpose of retrial of all issues involved in said cause all evidence heretofore introduced and received by the court, both parol and documentary, shall be considered as before the Court for all purposes for which the same was received by the court, as well as all stipulations heretofore filed in said cause.

2. This stipulation is not intended to cover and does not cover the question of whether or not additional evidence may be presented by either party on the retrial of the cause; but that question is expressly left open for determination by the Court upon said retrial.

Signed and dated this 13th day of March, 1951.

/s/ THURMAN L. McCORMICK,

/s/ HAROLD EASTON,

Attorneys for Plaintiff.

FULCHER & WYNN,

/s/ CAROL G. WYNN,

Attorneys for Defendant.

[Endorsed]: Filed March 16, 1951.



[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW AFTER TRIAL FOLLOWING  
APPEAL

A new trial of the above-entitled cause having heretofore been ordered following reversal upon appeal [see 183 F. 2d 125], and said cause having come on regularly for trial in the above-named court on March 21, 1951, and plaintiff having then appeared by Messrs. Thurman L. McCormick and Harold Easton, his attorneys, and defendant having then appeared by Messrs. Charles E. R. Fulcher and Carol G. Wynn, its attorneys, and the cause having proceeded to a retrial of the issues; and evidence having been received and the parties having stipulated that: "For the purpose of retrial of all issues involved in said cause all evidence heretofore [34] introduced and received by the court, both parol and documentary, shall be considered as before the Court for all purposes for which the same was received by the court, as well as all stipulations heretofore filed in said cause"; and the cause having been argued and submitted for decision, the court now makes findings of fact and conclusions of law as follows:

Findings of Fact

I.

At the time of the commencement of this action and at all times herein mentioned plaintiff was a citizen and resident of the State of Missouri.

At the time of the commencement of this action and at all times herein mentioned defendant was a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and place of business located in Los Angeles, California.

The amount in controversy between plaintiff and defendant in this action, exclusive of interest and costs, exceeds \$3,000.00.

Jurisdiction of this court is invoked by reason of the amount in controversy and the diversity of citizenship existing between plaintiff and defendant.

## II.

Some years prior to November 19, 1928, William Price and Elizabeth J. Price were married. At the time of this marriage Elizabeth J. Price had two adult children born of a previous marriage: A son named George E. Burton and a daughter, who was plaintiff's mother. Prior to November 19, 1928, plaintiff's mother had died, leaving plaintiff as the sole surviving issue of her body. [35]

For many years prior to November 19, 1928, plaintiff had resided, and at all times hereinafter mentioned continued to reside, in the State of Missouri; and William Price had resided, and at all times hereinafter mentioned until his death continued to reside, in the State of California with plaintiff's grandmother, Elizabeth J. Price.

For some time prior to November 19, 1928, William Price had been the owner of a substantial number of the authorized issued and outstanding

shares of the Series "B" six per cent preferred and the common capital stock of Southern California Edison Company, Limited, a corporation, the defendant herein.

### III.

On November 20, 1928, at Los Angeles, California, William Price with the intent to make a gift inter vivos caused the defendant to issue in the names of Elizabeth J. Price, George E. Burton and Lester Hurley, the plaintiff, as joint tenants with full rights of survivorship, certificates numbered AO-59630, AO-69633 and A-8752 to A-8756, inclusive, evidencing ownership of 575 shares of the common capital stock of the defendant corporation, of the par value of \$25.00 per share; and William Price then and there caused the certificates so issued to be delivered to plaintiff's grandmother, Elizabeth J. Price.

That at said time and place said William Price informed defendant in the presence of said Elizabeth J. Price that he expected to arrange for all dividends on said stock to be paid to and retained and used by said Elizabeth J. Price during her lifetime.

### IV.

On November 20, 1928, at Los Angeles, California, William Price with the intent to make a gift inter vivos [36] likewise caused the defendant to issue in the names of Elizabeth J. Price, George E. Burton and Lester Hurley, the plaintiff, as joint tenants with full rights of survivorship, certificates numbered AO-86998, AO-87011 and A-10216 evi-



dencing ownership of 191 shares of Series "B" six per cent preferred stock of the defendant corporation, together with certificates numbered AO-59759 and AO-59770 evidencing ownership of 88 shares of the common capital stock of the defendant corporation; and William Price then and there likewise caused the certificates so issued to be delivered to Elizabeth J. Price.

That at said time and place said William Price informed defendant in the presence of said Elizabeth J. Price that he expected to arrange for all dividends on said stock to be paid to and retained and used by said Elizabeth J. Price during her lifetime.

#### V.

Some time prior to November 19, 1928, Elizabeth J. Price had requested plaintiff to sign two dividend orders in blank on the usual form provided by defendant for such purpose, and plaintiff did gratuitously sign and deliver said dividend order blanks to Elizabeth J. Price in the State of Missouri, but plaintiff then had no knowledge or understanding of the purpose for which Elizabeth J. Price requested his signature or of the use which Elizabeth J. Price intended to make of the documents which the plaintiff then signed.

#### VI.

On December 11, 1928, Elizabeth J. Price delivered to defendant at Los Angeles, California, one of the dividend order forms mentioned above in Paragraph V, bearing the signatures of Elizabeth



J. Price, George E. Burton and plaintiff, directing that all dividends on the 575 shares of [37] common stock described above in Paragraph III be remitted to Elizabeth J. Price.

Said dividend order was numbered 12742, and was and is in the words and figures following:

Form-Inv. 21-A Rev. 12742

Kindly Sign and Return at Once.

Southern California Edison Company  
Dividend Order

Date Nov. 19th, 1928.

Southern California Edison Company,  
Los Angeles, California.

Gentlemen:

Until this order is revoked in writing, please remit to Mrs. Elizabeth J. Price at the address given below, by check drawn to his order, the dividend now due, or which may become due on all shares of stock of your company, now or hereafter standing in the name of Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley on the books of your company.

Stock how held—

Original Preferred .. Preferred Series A....

Common (575 shares) Preferred Series B....

Signature: Mrs. Elizabeth J. Price.

Address: .....

Signature: George E. Burton.

Address: 1046 Ann Ave.,  
Kansas City, Kansas.

Signature: Lester Hurley.

Address: .....

Witness:

Signature: Helen Burton.

Address: 1046 Ann Ave., K. C., Kans.

Address for sending dividends: 1301 West 52nd  
St., Los Angeles.

Note: Dividend Order must be signed by record owner of stock exactly as the name or names appear [38] on the certificate. If signed by agent, evidence of authority must accompany Dividend Order.

Dec. 11, 1928.

## VII.

On December 11, 1928, Elizabeth J. Price delivered to defendant at Los Angeles, California, the second of the dividend order forms mentioned above in Paragraph V, bearing the signatures of Elizabeth J. Price, George E. Burton and plaintiff, directing that all dividends on the 191 shares of Series "B" six per cent preferred and the 88 shares

of common stock described in Paragraph IV be remitted to Elizabeth J. Price.

Said dividend order was numbered 12743, and was and is in the words and figures following:

Form-Inv. 21-A Rev.

12743

Kindly Sign and Return at Once.

Southern California Edison Company  
Dividend Order

Date Nov. 22nd, 1928.

Southern California Edison Company,  
Los Angeles, California.

Gentlemen:

Until this order is revoked in writing, please remit to Mrs. Elizabeth J. Price at the address given below, by check drawn to his order, the dividend now due, or which may become due on all shares of stock of your company, now or hereafter standing in the name of Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley on the books of your company.

Stock how held—

Original Preferred .. Preferred Series A....

Common (88 shares) Preferred Series B....

(191 shares)

Signature: Mrs. Elizabeth J. Price.

Address: 1301 West 52nd St.,

Los Angeles.

Signature: George E. Burton.

Address: 1046 Ann Ave.,  
Kansas City, Kansas. [39]

Signature: Lester Hurley.

Address: 5716 Scarritt, K. C., Mo.

Witness:

Signature: R. N. Jones.

Address: 3829 Garfield Ave., K. C., Mo.

Address for sending dividends: 1301 West 52nd  
Street, Los Angeles.

Note: Dividend Order must be signed by record owner of stock exactly as the name or names appear on the certificate. If signed by agent, evidence of authority must accompany Dividend Order.

Dec. 11, 1928.

### VIII.

William Price died at Los Angeles, California, on January 5, 1929, and Elizabeth J. Price accompanied his remains to the State of Missouri for burial.

### IX.

On or about January 19, 1929, at Kansas City, in the State of Kansas, Elizabeth J. Price caused the Brotherhood State Bank of that city to forward to defendant at Los Angeles, California, the certificates for 575 shares of common stock listed above in Paragraph III, together with forms of assignment attached bearing the signatures of Elizabeth J. Price, George E. Burton and plaintiff, and pur-



porting to assign the 575 shares of common stock to "Mrs. Elizabeth J. Price, or George E. Burton."

The certificates with the forms of assignment attached were received by defendant on January 22, 1929, and the assignments were thereupon returned to the Brotherhood State Bank with the request by defendant that the signatures of the purported transferors be guaranteed.

On February 1, 1929, defendant again received the [40] forms of assignment with the signatures of Elizabeth J. Price and George E. Burton thereon guaranteed by Brotherhood State Bank. On February 7, 1929, defendant again returned the forms of assignment with a letter suggesting that the transferee designation be changed to joint tenancy form and again requesting that the purported signature of plaintiff be guaranteed. In response to this letter the Brotherhood State Bank altered the forms of assignment by changing the transferee designation from "Mrs. Elizabeth J. Price, or George E. Burton" to "Elizabeth J. Price and George E. Burton, as joint tenants, with full rights of survivorship"; and the bank thereupon added to each form of assignment a guarantee of the genuineness of the signature of plaintiff.

This alteration of the transferee designation was made by the Brotherhood State Bank without any authority from plaintiff and without the knowledge or consent of plaintiff.

Thereafter and on or about February 19, 1929, defendant received the forms of assignment from the Brotherhood State Bank with the transferee

designation altered and with the signatures of the transferors guaranteed as aforesaid, and defendant thereupon transferred the 575 shares of common stock to Elizabeth J. Price and George E. Burton as joint tenants.

Thereupon and at all times thereafter from on or about February 19, 1929, until following entry of the judgment of the United States District Court for the District of Kansas on July 26, 1945, hereinafter mentioned, none of the 575 shares of common stock appeared upon the records of defendant in the name of plaintiff.

#### X.

Thereafter and on or about March 18, 1929, Elizabeth J. Price and George E. Burton delivered [41] to defendant a dividend order, numbered 13157, on defendant's usual form, signed by Elizabeth J. Price and George E. Burton and directing that all dividends on common stock standing in the name of Elizabeth J. Price and George E. Burton as joint tenants be paid to Elizabeth J. Price until such order be revoked.

#### XI.

Thereafter from time to time defendant declared and set aside as payable to its shareholders certain dividend and stock rights.

The dividends so declared and set aside to the holder or holders of the 575 shares of common stock described above in Paragraph III during the period from February 15, 1929, until December 27, 1943,

were declared and set aside on the dates and in the amounts hereinafter set forth:

Item	Year	Amount of Dividend
1	1929 (last three quarters).....	\$ 862.50
2	1930.....	1,150.00
3	1931.....	1,150.00
4	1932.....	1,150.00
5	1933.....	1,150.00
6	1934.....	1,006.25
7	1935.....	862.50
8	1936.....	862.50
9	1937.....	934.37
10	1938.....	1,006.25
11	1939.....	1,006.25
12	1940.....	1,092.50
13	1941.....	1,006.25
14	1942.....	1,006.25
15	1943 (to Dec. 27).....	862.50

16—The aggregate value of all dividends  
so declared and set aside was and is \$15,108.12

The stock rights so declared and set aside to the holder or holders of the 575 shares of common stock described above in Paragraph III during the period from February 15, 1929, until December 27, 1943, were as follows:

17—In 1929, a total of 575 common stock rights then having a value of \$3.075

per right, or a total value of.....\$ 1,768.13  
were so declared and set aside

18—In 1930, a total of 575 common stock  
rights then having a value of \$3.70  
per right, or a total value of.....\$ 2,127.50  
were so declared and set aside

19—In 1931, a total of 575 common stock  
rights then having a value of \$2.53  
per right, or a total value of.....\$ 1,454.75  
were so declared and set aside

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20—The aggregate value of all stock  
rights so declared and set aside was  
and is .....\$ 5,350.38

21—The aggregate value of all dividends  
and all stock rights so declared and  
set aside was and is.....\$20,458.50

## XII.

The dividends and stock rights listed above in Paragraph XI in the total sum of \$20,458.50 were paid and delivered by defendant to Elizabeth J. Price under dividend order No. 13157 during the period from February 19, 1929, until the death of Elizabeth J. Price on December 27, 1943. [43]

That at the time of the payment by defendant to Elizabeth J. Price of each of the dividends and stock rights aforesaid, defendant had reason to know that Elizabeth J. Price alone would benefit from such payment and performance, and that Elizabeth J. Price would not account to or pay or



otherwise distribute to either George E. Burton or plaintiff any part of such payment and performance.

### XIII.

At the time of the issuance of the certificates for 575 shares of common stock described above in Paragraph III, on November 20, 1928, plaintiff was a minor of the age of twenty years, and had no actual notice or knowledge of the issuance of any of the certificates. The certificates were never in the possession or under the control of plaintiff, and plaintiff did not know of his ownership of any interest in any stock of the Southern California Edison Company, Limited, and did not know of the nature or purpose or effect or of the use made of the dividend order blanks signed by plaintiff at the request of Elizabeth J. Price, as stated above in Paragraph V, and did not know of the existence of any assignment of his interest in the 575 shares of common stock to Elizabeth J. Price and George E. Burton, and did not know of the declaration or payment of any dividends or of the issuance of any stock rights on the 575 shares of common stock, and had no knowledge of any of the facts set forth above in Paragraphs III, VI, IX, X, XI and XII, until March 18, 1944, except as in these findings expressly found.

For many years prior to 1928, plaintiff had great trust and confidence in Elizabeth J. Price and George E. Burton, and such feeling of trust and confidence on the part of plaintiff continued until the death of his grandmother on December 27, 1943.

Throughout this period both Elizabeth J. Price and [44] George E. Burton were well aware of and freely accepted the great trust and confidence reposed in each of them by plaintiff, and a fiduciary relationship in fact existed in all the dealings throughout this period between Elizabeth J. Price and plaintiff and George E. Burton and plaintiff.

From time to time throughout the years from 1928, until the death of Elizabeth J. Price on December 27, 1943, Elizabeth J. Price and George E. Burton concealed from plaintiff all the facts set forth above in Paragraphs III and IV, and concealed from plaintiff all the facts with respect to his ownership of any interest in any stock of the defendant corporation, and during this period Elizabeth J. Price from time to time represented to plaintiff that he might receive from her estate upon her death certain stock; that whatever he might so receive would depend upon the will and favor of his grandmother; that she resented any inquiry or prying by plaintiff into her financial affairs or business arrangements.

Plaintiff believed these representations and in reliance upon them signed the blank dividend orders at the request of Elizabeth J. Price, as set forth above in Paragraph V, and signed the forms of assignment mentioned above in Paragraph IX, without inquiry as to the reason for his signature and without any knowledge or understanding as to the purpose or effect of his signature.

As a further result of plaintiff's reliance upon

these representations, and of the concealment by Elizabeth J. Price and George E. Burton of plaintiff's interest in any stock of the defendant corporation, plaintiff made no inquiry concerning the stock of defendant or any other financial affairs or arrangements of either William Price or Elizabeth J. Price until after the death of his grandmother on December 27, 1943. [45]

#### XIV.

On March 20, 1944, promptly following his first discovery and knowledge on March 18, 1944, of any of the facts set forth above in Paragraphs III, VI, IX, X, XI or XII, plaintiff disaffirmed all the aforementioned transfers and dividend orders theretofore signed by him.

Thereafter and on June 2, 1944, George E. Burton commenced an action in the United States District Court for the District of Kansas, entitled "George E. Burton, plaintiff, v. Lester W. Hurley and Southern California Edison Company, Limited, a corporation, defendants," and numbered 4974 on the records of that court. A copy of the complaint in said action is hereto attached, marked Exhibit "A" and incorporated by reference herein.

Thereafter the defendant herein appeared in said Kansas action and moved to quash the service of process upon it as a party defendant therein, upon the ground that Southern California Edison Company, Limited, a corporation, was not present in the District of Kansas and had not been served with process in the District of Kansas. Upon the hear-



ing of this motion the United States District Court for the District of Kansas entered an order quashing the purported service of process upon the Southern California Edison Company, Limited, a corporation, as a party defendant in that action.

Thereafter and on or about July 11, 1944, plaintiff herein appeared as party defendant in said Kansas action and filed therein his answer and cross-petition, a copy of which is hereto attached, marked Exhibit "B" and incorporated by reference herein.

Thereafter George E. Burton as plaintiff in said Kansas action filed his answer to the cross-petition of Lester W. Hurley as defendant therein, a copy of which answer [46] to cross-petition is hereto attached, marked Exhibit "C" and incorporated by reference herein.

## XV.

Thereafter the Kansas action proceeded to a trial of the issues joined by the pleadings on the part of the plaintiff therein, George E. Burton, and the plaintiff herein, Lester W. Hurley, copies of which are hereto attached and marked Exhibits "A," "B" and "C" as stated above.

Following trial of those issues, the United States District Court for the District of Kansas, made and filed written findings of fact and conclusions of law in said action, a copy of which is hereto attached, marked Exhibit "D" and incorporated by reference herein.

Thereafter and on July 26, 1945, the United



States District Court for the District of Kansas entered its judgment in said action in favor of the defendant therein and plaintiff herein, Lester W. Hurley, and against the plaintiff therein, George E. Burton. In and by said judgment it was ordered, adjudged and decreed by the court that the plaintiff herein, Lester W. Hurley, is the owner of an undivided one-half ( $\frac{1}{2}$ ) interest in and to five hundred seventy-five (575) shares of common stock in the Southern California Edison Company, Limited, described above in Paragraph III. A copy of the judgment in the Kansas action is hereto attached, marked Exhibit "E" and incorporated by reference herein.

Prior to the commencement of plaintiff's action in this court the above-mentioned judgment of the Kansas court had become and was final.

#### XVI.

In the above-mentioned Kansas action, the United States District Court for the District of Kansas found and adjudicated that none of the assignments described above in [47] Paragraph IX, purporting to have been executed by plaintiff herein covering his interest in the 575 shares of common stock described above in Paragraph III, "bore the true and genuine signature of Lester W. Hurley, but that each of said signatures of Lester W. Hurley appearing thereon is a forgery."

## XVII.

All the dividends and stock rights listed above in Paragraph XI were declared and set aside, and were paid and delivered by defendant to Elizabeth J. Price, without any notice to plaintiff and without any knowledge or authorization or consent on the part of plaintiff other than as in these findings expressly found.

At all times mentioned above in Paragraph XI, plaintiff was the owner of an undivided one-third interest in the 575 shares of common stock described above in Paragraph III, and was entitled to receive one-third of all dividends and stock rights paid and delivered by defendant to Elizabeth J. Price, as stated above in Paragraph XII.

## XVIII.

On October 15, 1945, plaintiff made written demand on defendant herein to pay to plaintiff one-third of the amount of all cash dividends, and one-third of the value of all stock rights declared and set aside to the holder or holders of the 575 shares of common stock described above in Paragraph III, to wit, the dividends and stock rights listed and described above in Paragraphs XI and XII, together with legal interest thereon.

In response to plaintiff's demand, defendant requested time to investigate, but no payment has been made to plaintiff.

## XIX.

During the period from the receipt by defendant of [48] dividend order No. 12743 on December 11,

1928, as set forth above in Paragraph VII, until the death of Elizabeth J. Price, defendant from time to time declared and set aside as payable to its shareholders certain dividends and stock rights.

The dividends so declared and set aside during that period to the holder or holders of the 191 shares of Series "B" six per cent preferred stock described above in Paragraph IV were as follows:

Item	Year	Amount of Dividend
1	1929 .....	\$ 286.50
2	1930 .....	286.50
3	1931 .....	286.50
4	1932 .....	286.50
5	1933 .....	286.50
6	1934 .....	286.50
7	1935 .....	286.50
8	1936 .....	286.50
9	1937 .....	286.50
10	1938 .....	286.50
11	1939 .....	286.50
12	1940 .....	286.50
13	1941 .....	286.50
14	1942 .....	286.50
15	1943 (to Dec. 27) .....	286.50

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16—The aggregate value of all dividends

so declared and set aside was and is..\$4,297.50

The dividends so declared and set aside during that

period to the holder or holders of the 88 shares of common stock described above in Paragraph IV were as follows:

Item	Year	Amount of Dividend
1	1929 .....	\$ 176.00
2	1930 .....	176.00
3	1931 .....	176.00
4	1932 .....	176.00
5	1933 .....	176.00
6	1934 .....	154.00
7	1935 .....	132.00
8	1936 .....	132.00
9	1937 .....	143.00
10	1938 .....	154.00
11	1939 .....	154.00
12	1940 .....	167.20
13	1941 .....	154.00
14	1942 .....	154.00
15	1943 (to Dec. 27) .....	132.00

16—The aggregate value of all dividends

so declared and set aside was and is..\$2,356.20

The stock rights so declared and set aside during that period to the holder or holders of the 88 shares of common stock described above in Paragraph IV were as follows:

17—In 1929, a total of 88 common stock

rights then having a value of \$3.075

per right, or a total value of.....\$ 270.60

were so declared and set aside



18—In 1930, a total of 88 common stock rights then having a value of \$3.70 per right, or a total value of.....\$ 325.60 were so declared and set aside

19—In 1931, a total of 88 common stock rights then having a value of \$2.53 per right, or a total value of.....\$ 222.54 were so declared and set aside

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20—The aggregate value of all stock rights so declared and set aside was and is..\$ 818.84

21—The aggregate value of all dividends and all stock rights so declared and set aside was and is.....\$3,175.04

## XX.

The dividends and stock rights in the total sum of \$3,175.04, described above in Paragraph XIX, were paid to and delivered by defendant to Elizabeth J. Price under dividend order No. 12743 during the period from December 11, 1928, until the death of Elizabeth J. Price on December 27, 1943.

That at the time of the payment by defendant to Elizabeth J. Price of each of the dividends and stock rights aforesaid, defendant had reason to know that Elizabeth J. Price alone would benefit from such payment and performance, and that Elizabeth J. Price would not account to or pay or otherwise distribute to either George E. Burton or plaintiff any part of such payment and performance.

## XXI.

At all times since November 20, 1928, plaintiff's name, together with his post office address, has appeared on the records of defendant as one of the owners of the 191 shares of Series "B" six per cent preferred and the 88 shares of common capital stock described above in Paragraph IV.

Defendant did not, on November 20, 1928, or at any time thereafter until following plaintiff's disaffirmance on March 20, 1944, have actual notice or knowledge of the fact, nor did defendant have any reason to believe, that plaintiff was a minor at the time he signed dividend orders No. 12742 and No. 12743 mentioned above in Paragraph V, and at the time he signed the forms of assignment of the 575 shares of common capital stock mentioned above in Paragraph IX. [51]

## XXII.

All the dividends and stock rights listed above in Paragraph XIX were declared and set aside, and were paid and delivered by defendant to Elizabeth J. Price without any notice at any time to plaintiff and without any knowledge or authorization or consent on the part of plaintiff, other than in these findings expressly found.

At all times mentioned above in Paragraph XIX plaintiff was the owner of an undivided one-third interest in the 191 shares of Series "B" six per cent preferred stock and the 88 shares of common stock, and was entitled to receive one-third of all dividends and stock rights declared and set aside,

and later paid and delivered by defendant to Elizabeth J. Price, as stated above in Paragraph XX.

### XXIII.

At the time of the issuance of the certificates for 191 shares of Series "B" six per cent preferred stock and 88 shares of common stock referred to above in Paragraph IV, on November 20, 1928, plaintiff was a minor of the age of twenty years, and had no actual notice or knowledge of the issuance of any of the certificates. The certificates were never in the possession or under the control of plaintiff, and plaintiff did not know of his ownership of any interest in any stock of the Southern California Edison Company, Limited, and did not know of the nature or purpose or effect or of the use made of the dividend order blanks signed by plaintiff at the request of Elizabeth J. Price, as stated above in Paragraph V, and did not know of the declaration or payment of any dividends or of the issuance of any stock rights on the 191 shares of Series "B" six per cent preferred stock or the 88 shares of common stock, and had no knowledge of any of the facts set forth above in Paragraphs IV, VII, XIX and XX, until March 18, 1944. [52]

### XXIV.

On March 20, 1944, promptly following his first discovery and knowledge on March 18, 1944, of any of the facts set forth above in Paragraphs IV, VII, XIX or XX, plaintiff disaffirmed all the aforementioned transfers and dividend orders theretofore signed by him.



## XXV.

On October 15, 1945, plaintiff made written demand on defendant to pay plaintiff one-third of all the cash dividends, together with one-third of the value of all stock rights, declared and set aside on the 191 shares of Series "B" six per cent preferred stock and the 88 shares of common stock, to wit, the dividends and stock rights listed and referred to in Paragraphs XIX and XX above; but the defendant has failed and refused to pay the same or any part thereof.

Prior to the commencement of this action, on March 6, 1946, plaintiff demanded of defendant that defendant account for and deliver to plaintiff all dividends and stock rights declared and set aside by defendant for the owners of the 121 shares of Series "B" six per cent preferred stock and 88 shares of common stock described above in Paragraph IV, but defendant has failed and refused to account for or pay or deliver any part thereof.

Thereafter and on June 5, 1946, defendant made written demand upon plaintiff that plaintiff proceed against the Estate of Elizabeth J. Price, deceased, and against George E. Burton and that plaintiff pursue his remedy against the Estate of Elizabeth J. Price, deceased, and George E. Burton, and each of them, and defendant then and there informed plaintiff that in the event plaintiff failed so to pursue his remedy, defendant would deem itself exonerated to the extent to which it was thereby prejudiced. [53] Plaintiff has refused to proceed as



requested, but the court finds that defendant has not been prejudiced thereby.

### XXVI.

That plaintiff was a minor at the time he signed dividend orders No. 12742 and No. 12743, and plaintiff received no consideration for the execution of either of the dividend orders, and the nature of the documents and the purpose for which they were to be used was concealed from the plaintiff at the time he signed said dividend orders and thereafter. That plaintiff's disaffirmance of the dividend orders under the circumstances hereinabove set forth in these findings of fact was made within a reasonable time after reaching his majority.

### XXVII.

That defendant had no actual knowledge of the fraud hereinbefore found to have been perpetrated upon Lester W. Hurley by his grandmother, either at the time said fraud was perpetrated or thereafter; and the court further finds that defendant had no reason to know or believe, other than as found above in Paragraphs XII and XX, that any fraud was being, or had been so perpetrated.

### XXVIII.

That under the respective dates of January 25, 1929; December 27, 1929, and December 19, 1930, resolutions of the Board of Directors of the Southern California Edison Company, Ltd., were adopted authorizing issuance to the common and preferred

stockholders of this corporation of record on the respective dates of March 29, 1929; February 28, 1930, and February 27, 1931, of the stock rights described in Paragraph XI, items 17, 18, 19, 20 and 21 and in Paragraph XIX, items 17, 18, 19, 20 and 21. [54]

That said respective resolutions further provided that warrants representing each stockholder's right to subscribe for and purchase said additional shares be issued in the name of the stockholder and mailed or delivered on or before April 22, 1929; March 25, 1930; March 25, 1931, together with a letter setting forth the terms and conditions on which the said right to subscribe might be exercised, as set out in said resolutions, to each stockholder having such right of record on March 29, 1929; February 28, 1930, and February 27, 1931; and further provided that all of said warrants representing right to subscribe for and purchase full shares be issued in the name of the stockholder and be assignable by endorsement and delivery of said warrant.

## Conclusions of Law

### I.

The title to the 575 shares of common stock described in Paragraph III of the findings of fact was litigated and fully and finally adjudicated in that certain action in the United States District Court for the District of Kansas, entitled "George E. Burton, plaintiff, v. Lester W. Hurley, defendant," and numbered 4974; and the findings of the

United States District Court for the District of Kansas that each of the signatures "Lester W. Hurley" appearing on the forms of assignment described above in Paragraph IX of the findings of fact is a forgery and that none of the purported assignments bear the true and genuine signature of the plaintiff herein is final and res judicata as between the plaintiff herein and George E. Burton; but neither that finding nor the judgment of the United States District Court for the District of Kansas decreeing plaintiff to be "the owner of an undivided one-half ( $\frac{1}{2}$ ) interest in and to five hundred seventy-five (575) shares [55] of common stock in the Southern California Edison Company, Limited," is res judicata as between plaintiff and defendant herein. [See *Hurley v. Southern California Edison Co.*, 183 F. 2d 125, 134-136 (9th Cir. 1950); cf. *Perkins v. Benguet Mining Co.*, 55 Cal. App. (2d) 720, 747-53, 132 P. (2d) 70 (1942); *Commercial Nat. Bank v. Alleway*, 207 Iowa 419, 223 N.W. 167 (1929).]

## II.

The finding of the United States District Court for the District of Kansas, "That the dividend order, dated November 19, 1928, and filed with the Southern California Edison Company, Limited, on December 11, 1928, does not bear the true and genuine signature of Lester Hurley, but that the purported signature of Lester Hurley appearing thereon is a forgery," being dividend order No. 12742 set forth above in Paragraph VII of the



findings of fact, must be considered a gratuitous finding of fact and therefore not *res judicata*, since the validity of dividend order No. 12742 was not placed in issue by the pleadings in that action and was not a matter necessary to be adjudicated in determining that action. [Garwood v. Garwood, 29 Cal. 514 (1866); Lang v. Lang, 182 Cal. 765, 768, 190 Pac. 181 (1920); Hutchinson v. Reclamation District, 81 Cal. App. 427, 437, 254 Pac. 606 (1927); cf. Baar v. Smith, 201 Cal. 87, 99 Pac. 827 (1927).]

### III.

According to the law of California which governs this case [Erie R.R. Co. v. Thompkins, 304 U.S. 64, 78 (1938)], the validity of the dividend orders and of the assignments of the 575 shares of common stock are to be determined by the law of Missouri where plaintiff executed them. [Fenton v. Edwards, 125 Cal. 43, 58 Pac. 320 (1899); Calif. Civ. Code, § 3453; cf. Restatement, Conflict of Laws, §§ 49, 255, 256, 283.] [56]

### IV.

Execution by plaintiff of dividend orders No. 12742 and No. 12743 and the forms of assignment of the 575 shares of common stock constituted acts of a minor which were subject to disaffirmance, under both the law of California and the law of Missouri, at the election of the minor within a reasonable time after reaching his majority.

“The effect of such a disaffirmance, when made, is the same as if the act disaffirmed had never occurred,—it is deemed void *ab initio*. Flittner v.



Equitable Life Assur. Soc., 30 Cal. App. 209, 157 P. 630. The net effect is that one who deals with an infant does so at his peril, and may suffer loss through having to pay the same amount over again after disaffirmance. *Pollock v. Industrial Accident Commission*, 5 Cal. 2d 205, 54 P. 2d 695. Such is the law generally. See *Sternlieb v. Normandie Nat. Securities Corp.*, 263 N.Y. 245, 188 N.E. 726, 90 A.L.R. 1437. It is the law of Missouri. *Robison v. Floesch Const. Co.*, 291 Mo. 34, 236 S.W. 332, 20 A.L.R. 1239. The infant's disaffirmance renders his contract 'void ab initio.' *Windisch v. Farrow*, Mo. App., 159 S.W. 2d 392; *Phillips v. Savings Trust Co.*, 231 Mo. App. 1178, 85 S.W. 2d 923." [*Hurley v. Southern California Edison Co.*, *supra*, 183 F. 2d at 132.]

## V.

Inasmuch as plaintiff was a minor at the time he signed dividend orders No. 12742 and No. 12743 mentioned above in Paragraph V, and at the time he signed the forms of assignment of the 575 shares of common stock mentioned above in Paragraph IX, and inasmuch as plaintiff received no consideration for the execution of any of the writings, and the nature of the documents and the purpose for which they were to be used was concealed from plaintiff at the time he signed the same and [57] thereafter, plaintiff's disaffirmance thereof under the circumstances hereinabove set forth in the findings of fact was made within a reasonable time after reaching his majority.

“What constitutes a ‘reasonable time’ depends upon the circumstances of each particular case. *Hastings v. Dollarhide*, 24 Cal. 195. The reason for this grant of a reasonable time was stated in *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N.W. 283, 284, 47 Am. Rep. 798, as follows: ‘For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them.’ Under the circumstances of this case, Hurley had no opportunity to exercise any judgment upon the matter until he learned he had some interest in the stock. Until then, a reasonable time had not elapsed.” [*Hurley v. Southern California Edison Co.*, *supra*, 183 F. 2d at 132.]

## VI.

Accordingly, from November 20, 1928, until the death of Elizabeth J. Price on December 27, 1943, plaintiff was the owner of an undivided one-third interest in the 575 shares of common stock described above in Paragraph III of the findings of fact, and was likewise the owner of an undivided one-third interest in the 191 shares of Series “B” six per cent preferred stock and the 88 shares of common stock described above in Paragraph IV of the findings of fact.

And since the death of Elizabeth J. Price on December 27, 1943, plaintiff has been, and at the commencement of this action was the owner of an undivided one-half interest in the 575 shares of

common stock described above in Paragraph III of the findings of fact, and was likewise the owner of an undivided one-half interest in the 191 shares of Series "B" [58] six per cent preferred stock and the 88 shares of common stock described above in Paragraph IV of the findings of fact.

## VII.

Accordingly, from November 20, 1928, until the death of Elizabeth J. Price on December 27, 1943, plaintiff was the owner of, and was entitled to receive and be paid, one-third of all dividends declared and paid on the 575 shares of common stock described above in Paragraph III of the findings of fact, and on the 191 shares of preferred stock and 88 shares of common stock described above in Paragraph IV of the findings of fact, together with one-third of all stock rights declared and issued to the owners of said stock.

## VIII.

Neither the four-year period of limitations specified in subsection 1 of Sec. 337, nor the two-year period of limitations specified in subsection 1 of Sec. 339 of the California Code of Civil Procedure commenced to run against plaintiff's cause of action asserted herein until after October 15, 1945, the date of plaintiff's demand of defendant for payment of his one-third share of all dividends and stock rights. Accordingly, plaintiff's cause of action herein is not barred by the applicable California statutes of limitations. [*Macdermott v. Hayes*, 175



Cal. 95, 118, 170 Pac. 616 (1917); *Ralston v. Bank*, 112 Cal. 208, 44 Pac. 476 (1896); cf. *Perkins v. Benguet Mining Co.*, *supra*, 55 Cal. App. (2d) at 770.]

### IX.

The failure of plaintiff, after demand by defendant, to pursue his rights against George E. Burton and the Estate of Elizabeth J. Price, deceased, does not exonerate defendant from liability in this action.

### X.

Payment by defendant to Elizabeth J. Price, as a [59] co-obligee of plaintiff, did not operate to extinguish defendant's obligations in accordance with the provisions of § 1475 of the Civil Code of the State of California because defendant, the obligor, had reason to know that Elizabeth J. Price, the recipient, would alone receive benefit from the performance, and would not account to either of her co-obligees, George E. Burton and plaintiff; and neither the dividends nor stock rights constituted "deposits" in the hands of defendant and are not therefore controlled by the provisions of the California Civil Code relating to deposits. [*Hurley v. Southern California Edison Co.*, *supra*, 183 F. 2d at 128-131, 133-134.]

### XI.

Since, for the reasons above stated, § 1475 of the California Civil Code is not applicable to discharge the obligation of defendant in this case, plaintiff is entitled to recover one-third of all dividends de-



clared and set aside by defendant on the 575 shares of common stock described above in Paragraph III of the findings of fact, to wit, the sum of \$5,036.04; together with the value of one-third of all stock rights declared and set aside to the owners of the 575 shares of stock, to wit, the sum of \$1,783.46; together with one-third of all dividends declared and set aside by defendant on the 191 shares of preferred stock, to wit, the sum of \$1,432.50, and the 88 shares of common stock described above in Paragraph IV, to wit, the sum of \$785.40; together with one-third of the value of all stock rights declared and set aside to the owners of the 88 shares of common stock, to wit, the sum of \$272.95; or the total sum of \$9,310.35, together with interest thereon at the rate of seven per cent per annum from the date of plaintiff's demand on defendant for payment, October 15, 1945. [See *Telegraph Co. v. Davenport*, 97 U.S. 369 (1878); *Cooper v. Spring Valley Water Co.*, 171 Cal. 158, 153 Pac. 936 (1915); [60] *Taft v. Presidio & F.R. Co.*, 84 Cal. 131, 24 Pac. 436 (1890).]

Let judgment be entered for plaintiff accordingly.  
April 26, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 26, 1951. [61]

United States District Court for the Southern  
District of California, Central Division

No. 5187-WM Civil

LESTER W. HURLEY,

Plaintiff,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a Corporation,

Defendant.

### JUDGMENT

The Court having made and filed findings of fact and conclusions of law after trial following appeal herein, and having ordered entry of judgment in accordance therewith,

It Is Now Ordered, Adjudged and Decreed that plaintiff, Lester W. Hurley, have and recover of and from defendant, Southern California Edison Company, Limited, a corporation, the sum of \$9,310.35 with interest thereon at the rate of seven per cent per annum from October 15, 1945, to wit, \$12,912.91, together with plaintiff's costs in this action incurred, to be taxed by the Clerk in the sum of \$114.95.

April 26, 1951.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed April 26, 1951.

Entered April 26, 1951. [88]

[Title of District Court and Cause.]

MOTION OF DEFENDANT FOR NEW TRIAL

To the above-entitled Court and to the Clerk thereof, and to above-named plaintiff and Harold Easton and Thurman L. McCormick, his attorneys:

Comes now the defendant, Southern California Edison Company, Limited, a corporation, and moves the above-entitled Court for an order vacating the Findings of Fact and the Conclusions of Law and the Judgment dated on or about April 26, 1951, and granting a new trial of the above-entitled action, upon the following grounds:

(a) Insufficiency of the evidence to justify the decision and judgment; and

(b) Errors in law occurring at the trial and in the Conclusions of Law.

Defendant hereby specifies the particulars wherein the [89] evidence is claimed to be insufficient to justify the decision and judgment as follows:

1. To justify a finding that William Price informed defendant "that he expected to arrange for all dividends on said stock to be paid to and retained and used by said Elizabeth J. Price during her lifetime." (Findings of Fact III and IV.)

2. To justify a finding that defendant had reason to know that Elizabeth J. Price alone would benefit from payment and performance to her of said dividends and stock rights and that she would not account to or pay otherwise distribute to plain-

tiff any part of such payment or performance. (Finding of Fact XII.)

3. To justify finding that plaintiff did not know of nature or purpose or effect or of use to be made of dividend orders and did not know of existence of assignment of his interest in 575 shares of common stock. (Finding of Fact XIII.)

4. To justify finding that dividend orders signed by plaintiff were "blank dividend orders" at the time plaintiff signed them. (Findings of Fact V, XIII and XXIII.)

5. To justify finding that on March 20, 1944, plaintiff disaffirmed "all the aforementioned transfers and dividend orders." (Finding of Fact XIV.)

6. To justify finding plaintiff was the owner of an undivided one-third interest in the 575 shares of common stock and was entitled to receive one-third of all dividends and stock rights paid and delivered to Elizabeth J. Price. (Finding of Fact XVII.)

7. To justify finding defendant had reason to know that Elizabeth J. Price alone would benefit from payments referred to in paragraph XX and would not account to or pay or otherwise distribute to plaintiff any part of such payment. (Finding of Fact XX.) [90]

8. To justify a finding that plaintiff made any disaffirmance on March 20, 1944. (Finding of Fact XXI.)



9. To justify a finding plaintiff was entitled to receive one-third of all dividends and stock rights paid and delivered by defendant to Elizabeth J. Price as stated in paragraph XX of Findings of Fact. (Finding of Fact XXII.)

10. To justify finding that plaintiff did not know of his ownership of any interest in any stock of Southern California Edison Company, Limited, and did not know of the nature or purpose or effect or the use made of the dividend order blanks signed by him. (Finding of Fact XXIII.)

11. To justify finding that on March 20, 1944, plaintiff disaffirmed all of the aforementioned transfers and dividend orders signed by him. (Finding of Fact XXIV.)

12. To justify a finding, (1) that plaintiff disaffirmed any dividend orders and (2) that any disaffirmance was made within a reasonable time after reaching his majority. (Finding of Fact XXVI.)

13. To justify a finding that the facts found in paragraphs X and XX gave any reason to defendant to know or believe any fraud was being or had been perpetrated on plaintiff. (Finding of Fact XXVII.)

Defendant further specifies as errors of law occurring at the trial and in the Conclusions of Law, as follows:

1. The Court erred in its holding that the validity of the dividend orders and of the assignments of the 575 shares of common stock are to be determined by the law of Missouri. (Conclusion of Law III.)

2. The Court erred in its holding that the execution by plaintiff of dividend orders No. 12742 and No. 12783 and the forms of assignment of the 575 shares of common stock by a minor, were subject to disaffirmance by the minor within a [91] reasonable time after reaching his majority. (Conclusion of Law IV.)

3. The Court erred in holding that plaintiff disaffirmed either the dividend orders or the assignments within a reasonable time after reaching his majority. (Conclusion of Law V.)

4. Court erred in holding that from November 20, 1928, until December 27, 1943, plaintiff was the owner of an undivided one-third interest in 575 shares of common stock. (Conclusion of Law VI.)

5. Court erred in holding that from November 20, 1928, until December 27, 1943, plaintiff was the owner of, and entitled to receive and be paid one-third of all dividends declared and paid on 575 shares of common stock and on the 191 shares of preferred stock and 88 shares of common stock referred to in paragraphs III and IV of findings of fact, together with one-third of all stock rights declared and issued to the owners of said stock. (Conclusion of Law VII.)

6. Court erred in holding that neither the four-year period of limitations nor the two-year period of limitations commenced to run against plaintiff's cause of action until after October 15, 1945, and that plaintiff's cause of action is not barred by the applicable California Statute of Limitations. (Conclusion of Law VIII.)

7. Court erred in holding that the payments made to Elizabeth J. Price, plaintiff's co-obligee, did not operate to extinguish defendant's obligations to plaintiff in accordance with the provisions of Sec. 1475 C.C. of California. (Conclusion of Law X.)

8. Court erred in holding plaintiff is entitled to recover various sums specified in paragraph XI of Conclusions of Law.

Dated May 4, 1951.

FULCHER & WYNN,  
By /s/ CAROL G. WYNN,  
Attorneys for Defendant. [92]

[Title of District Court and Cause.]

## MEMORANDUM OF POINTS AND AUTHORITIES ON MOTION FOR NEW TRIAL

1. In the absence of knowledge or reason to know on part of defendant (1) that plaintiff had not desired payment of all dividends to be made to Mrs. Price and (2) that Mrs. Price was not disposing of the dividends thus paid to her as agreed to between the joint tenants, (and defendant had no

such knowledge or reason to so know, but on the contrary justifiably had reason to believe and know (1) that plaintiff did so consent, and (2) was therefore acquiescing in whatever disposition of the dividends Mrs. Price was making), defendant extinguished its obligation to the joint tenants by payment of dividends to Mrs. Price.

Sec. 1475 C.C. of California.

Sec. 131 Restatement Contracts.

Cober v. Connally,

20 Cal. (2d) 741. [93]

2. Joint tenants may agree between themselves as to the disposition of the income from the joint tenancy property.

Hammond v. McArthur,

30 Cal. (2d) 512, 516 (5), 183 P. (2d) 1, 3;

Wells v. Wells,

64 Cal. App. (2d) 113, 148 P. (2d) 126;

48 C.J.S. 933, Sec. 10.

3. As against this defendant, plaintiff has no right of disaffirmance because of his minority or fraud of others of his dividend orders or of his assignments of the 575 shares of common stock, in so far as dividends and stock rights paid by defendant between the time of assignments and any notice by plaintiff to defendant of rescission.

Casey v. Kastel,

237 N.Y. 305, 142 N.E. 671, 31 A.L.R. 995;



Carolina T. & T. Co. v. Johnson,  
168 F. (2d) 489, 3 A.L.R. (2d) 870.  
Restatement Contracts, Sec. 170(2) C.

4. Law of California alone determines the effect of the dividend orders and the assignments.

Sections 183, 355 and 366.

Restatement Conflict of Laws,  
Sec. 1646 C.C. of California.

5. The gift to plaintiff of the stock as one of three joint tenants was made to him subject to the condition that the dividends were to be paid to Mrs. Price under dividend orders until such orders were revoked and with discretion vested in Mrs. Price as to disposition of the dividends paid to her in pursuance of such orders.

38 C.J.S. 817, Sec. 38;

Lynch v. Lynch,  
124 Cal. App. 454, 12 P. (2d) 741;

Gordon v. Barr,  
13 Cal. (2d) 596, 91 P., (2d) 101;

Calkins v. Equitable,  
B. & L. Ass'n., 126 Cal. 531, 59 P. 30;

Ruiz v. Dow,  
113 Cal. 490, 45 P. 867; [94]

Jean v. Jean,  
207 Cal. 115, 277 P. 313;  
121 A.L.R. 425 Annotation.

6. Plaintiff must have acquired knowledge of the fact that he had an interest in the ownership of stock in defendant Company when he, at the age of twenty years, signed the dividend orders and the assignments of the 575 shares of common stock attached to the stock certificates.

66 C.J.S. 651;

20 Cal. Jur. 241 Sec. 10.

7. As plaintiff knew, when he reached maturity, of his ownership of interest in stock of defendant Company, his right, if any, to disaffirm the dividend orders and the assignments within a reasonable time, began to run upon his reaching maturity, and his disaffirmance, if any, was not made within a reasonable time. Such reasonable time may not exceed the period of the statute of limitations otherwise applicable.

Hurley v. So. Calif. Edison Co.,  
183 F. (2d) 125, 132;

Lanning v. Brown,  
(Ohio), 95 N.E. 921;

Urban v. Grimes,  
2 Grant Cas. (Pa.) 96;

Drake v. Ramsay,  
5 Ohio 252;

O'Donohue v. Smith,  
114 N.Y. Supp. 536;

Sternlieb v. Normandie,  
(N.Y.), 188 N.E. 726;

Chicago Telephone Co. v. Schultz,  
121 Ill. App. 573;

Blake v. Hollingsworth,  
76 S.E. 814;

Putall v. Walker,  
55 So. 844;

Mourant v. Pullman T. & S. Bank,  
(Ill.), 41 N.E. (2d) 1007;

Wright v. Buchanan,  
(Ill.), 123 N.E. 53.

Respectfully submitted,

FULCHER & WYNN,  
By /s/ CAROL G. WYNN,  
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 4, 1951. [95]

[Title of District Court and Cause.]

ORDER AMENDING FINDINGS OF FACT  
AND DENYING DEFENDANT'S MOTION  
FOR A NEW TRIAL

This cause having come before the court for hearing on defendant's motion for a new trial filed May 4, 1951, and the motion having been submitted for decision upon the briefs of the parties; and it appearing to the court that due to clerical mistake [Fed. R. Civ. P. 60(a)] paragraph XXVII of the findings of fact [p. 21, line 20] refers to paragraph "X" and "XX" of the findings of fact, whereas the correct reference should be to paragraphs "XII" and "XX";

It Is Now Ordered that paragraph XXVII of the findings of fact be amended [Fed. R. Civ. P. 59(a)] by striking therefrom the Roman numeral "X" appearing in line 20 on page 21, and by inserting in lieu thereof the Roman numeral "XII."

It Is Further Ordered that defendant's motion for [97] a new trial be and is hereby denied.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail on the attorneys appearing in this cause.

July 9, 1951.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed July 10, 1951. [98]



[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF  
APPEALS UNDER RULE 73(B)

Notice Is Hereby Given that Southern California Edison Company, Limited, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 27, 1951, denial of said defendant's Motion for New Trial in said action having been entered on July 10, 1951.

Dated this 31st day of July, 1951.

FULCHER & WYNN,  
By /s/ CAROL G. WYNN,  
Attorneys for Defendant.

[Endorsed]: Filed August 7, 1951. [99]

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT AND APPELLANT INTENDS TO RELY ON APPEAL

On appeal from the judgment herein entered pursuant to Findings of Fact and Conclusions of Law filed herein on April 27, 1951, defendant and appellant intends to rely upon the following points:

A. The evidence shows, without conflict, that the following Findings of Fact are not supported by the evidence:

1. Said evidence shows that William Price and Elizabeth Price, prior to November 19, 1928, owned, as joint tenants, 575 shares of common stock, and that Elizabeth J. Price owned 191 shares of Series B, 6%, preferred stock, and 88 shares of common stock of defendant Company. Finding II, that prior to said date, William Price was the sole owner of any of this stock, is not supported by the [100] evidence.

2. The evidence shows that both William Price and Elizabeth J. Price were donors, and that the gift was made subject to the express provision that Elizabeth J. Price was to receive and use the dividends until defendant received orders to the contrary. The Findings III and IV that William Price, alone, made the gift referred to, and that it was unqualified, and that said Price merely expected to arrange for all dividends to be paid to and retained and used by Elizabeth J. Price, is contrary to the evidence.

3. The evidence shows that the dividend orders were fully made out when signed by plaintiff, and that on their face they disclosed to him their purpose and the use to which they were to be put. The evidence does not support the Finding (V) that plaintiff was requested to sign the dividend orders in blank or that he did not know or understand the purpose for which his signatures were requested, or the use intended to be made of the documents he then signed.

4. The evidence does show that defendant knew, or had reason to know, that Elizabeth J. Price, alone, would benefit from such payments, and that she would not account to, or pay, or otherwise distribute to George E. Burton, or plaintiff, any part of such payments—there being no evidence whatsoever to show that defendant knew, or had reason to know, or how Elizabeth J. Price was, in fact, using payments made to her. The Findings in paragraph XII to the contrary effect, are not supported by the evidence.

5. The evidence shows that plaintiff had abundant opportunity to know, and every reason to know, of his ownership of an interest in stock of defendant Company, and of the nature and purpose and effect and use to be made of the dividend orders signed by him, and of the existence of the assignments made by him of his interest in 575 shares of common stock and of the [101] facts set forth in paragraphs III, VI, IX, X, XI and XII many years prior to March 18, 1944. The Findings of Fact to the contrary (XIII) are not supported by the evidence. Additional Findings of Fact in paragraph XIII of the Findings to the effect that he signed blank dividend orders without knowledge or understanding as to the purpose or effect of his signature, are likewise not supported by the evidence.

6. The evidence does not show any disaffirmance by plaintiff of the dividend orders. Finding to the contrary (XIV) is not supported by the evidence.



7. The evidence shows that plaintiff authorized and consented to the payment of dividends to Elizabeth J. Price and after the assignment by him of the 575 shares was not, as against this defendant, an owner of any interest therein or entitled to receive any part of the dividends and stock rights paid and delivered to Elizabeth J. Price. The Findings to the contrary (XVII) are not supported by the evidence.

8. The evidence does not show defendant knew, or had reason to know, that Elizabeth J. Price, alone, would benefit from such payments and performance, and would not account to or pay, or otherwise distribute to either George E. Burton or plaintiff, any part thereof. The Findings to the contrary (XX) are not supported by the evidence.

9. The evidence shows that plaintiff had notice of and knowledge of, and authorized and consented to the payment and delivery by defendant to Elizabeth J. Price of the dividends and stock rights referred to in paragraph XIX of the Findings, and that he was not entitled to receive any part thereof until he gave notice to defendant of his desire to receive one-third of such payments. The Findings to the contrary (XXII) are not supported by the evidence.

10. The evidence shows that plaintiff knew, and had [102] every reason to know, of his interest in 191 shares, Series B, 6% preferred and 88 shares of common stock of defendant Company and of the nature and purpose and effect and use to be made



of fully made out dividend orders signed by him. The Findings to the contrary (XXIII) are not supported by the evidence.

11. The evidence does not show any disaffirmance by plaintiff of the dividend order referred to in paragraph XXIV of the Findings and the Findings to that effect in said paragraph are not supported by the evidence.

12. The evidence shows that plaintiff knew, and had reason to know, of the execution of said dividend orders by him, the nature of such documents, and the purpose for which they were to be used from the time he signed the same, and that any disaffirmance thereof by him was therefore not made within a reasonable time after reaching his majority. The Findings to the contrary (XXIV) are not supported by the evidence.

13. The evidence shows that defendant had reason to believe that payment of dividends and stock rights to Elizabeth J. Price were so made by it knowing, and having reason to know, that such payments were being made in accordance with the express terms of conditions attached by the donors of such stock to the three joint tenant donees, and according to the written directions of said three donees.

14. That any express or implied Finding, paragraph XXVII, that defendant knew, or had reason to know, of any fraud being practiced upon plaintiff for any reason whatsoever, is not supported by the evidence.

15. There is no evidence that any fraud was ever practiced upon plaintiff by either Elizabeth J. Price or George E. Burton, the evidence showing only that plaintiff was not informed by the donors of the nature of the gift made by them to him, or that if informed thereof, at the time of the trial [103] he had forgotten that he had been so informed. Any express or implied Finding of Fact to the contrary in paragraph XXVII, or in any other paragraph of said Findings, are not supported by the evidence.

B. The Findings of Fact do not support the Conclusions of Law nor the judgment herein, and the Court made errors of law in not holding that:

1. The execution of the dividend orders and the assignment forms covering the 575 shares of common were not subject as against this defendant to disaffirmance within a reasonable time after reaching his majority.

2. Plaintiff did not, as a matter of law, make any disaffirmance within a reasonable time after reaching majority of either his execution of the dividend orders, or of the assignment forms covering the 575 shares of common stock.

3. Insofar as plaintiff continued to be an owner, as joint tenant, of the stock referred to in the complaint herein, Section 1475, Civil Code of the State of California, protects the defendant in the payments it made to Elizabeth J. Price, one of the joint tenants, or such dividends and stock rights

for the reason that (1) no fraud was practiced upon plaintiff, (2) if any such fraud was practiced upon plaintiff, defendant did not know, or have any reason to know, of such fraud, and had every reason to know that the plaintiff had consented to the making of such payments to his co-joint-tenant.

4. The evidence showing that the gift to the three joint tenants was made subject to the condition, at the time the gift was made, that [104] payments of dividends and stock rights on all of said stock should be made to Elizabeth J. Price until defendant received orders to the contrary from one or all of the joint tenants. It follows, as a matter of law, that such condition operated as a matter of law, as a limitation upon the extent of the gift and that Elizabeth J. Price had the legal right as against this defendant to receive payment of all such dividend and stock rights until defendant was informed by one or all of the joint tenants that it should no longer make all such payments to Elizabeth J. Price.

It follows that defendant was entitled to judgment.

**FULCHER & WYNN,**  
By /s/ **CAROL G. WYNN,**  
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1951. [105]



[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

You will please prepare a transcript on appeal herein, including the following, to wit: Pleadings, pre-trial stipulation dated June 11, 1946; the findings of fact and conclusions of law together with the direction for entry of judgment thereon; the judgment, motion for new trial with date of filing, order denying motion for new trial with date of entry thereof; the notice of appeal with date of filing, the designations or stipulations of the parties as to matter to be included in the record; a reporter's transcript of the testimony of (1) Plaintiff Lester W. Hurley, (2) of George E. Burton, (3) of R. N. Jones, all on November 13, 1946, and (4) of Frank L. Greenhouse on November 3, 1948; exhibits offered in evidence by the parties hereto, defendant's memorandum of points and authorities pursuant to pre-trial order, stipulation re retrial filed March 16, 1951, and statement by the appellant of the points on which he intends to rely on [107] appeal.

Counsel for defendant and appellant suggests and requests, subject to approval of Court, that in the preparation of the Transcript of Record, in lieu of reprinting in full copies of the various documents hereafter specified, said documents be included therein by reference to "Transcript of Record" on



a former appeal in this same action, being No. 12278 in the records of the United States Court of Appeals for the Ninth Circuit. The documents referred to, and where found in said Transcript, are as follows:

	Pages
Complaint for Accounting .....	2-19
Answer of Defendant .....	19-22
Pre-trial Stipulation .....	23-31
Supplement to Answer of Defendant.....	31-33
Exhibits A, B, C and D as attached to Findings of Fact and Conclusions of Law dated April 26, 1949, these exhibits being likewise attached to Findings of Fact and Conclusions of Law on which judgment herein appealed from is based.....	64-93

Dated August 16, 1951.

FULCHER & WYNN,  
By /s/ CAROL G. WYNN,  
Attorneys for Defendant and  
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1951. [108]

[Title of District Court and Cause.]

STIPULATION RE DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL

It Is Hereby Stipulated by and between the plaintiff and appellee and defendant and appellant through their respective attorneys of record, the undersigned, that the Clerk of the about-entitled Court, in preparing record of appeal herein, shall, insofar as the exhibits offered in evidence by the parties hereto in the trial of the above-entitled action, include in the record on appeal only the following exhibits:

1. Plaintiff's Exhibits Nos. 1 to 7, inclusive, covering 575 shares of common stock with stock assignment forms attached with all notations appearing on the front and back of said assignments and powers of attorney.
2. Plaintiff's Exhibits Nos. 8 to 13, inclusive.
3. Plaintiff's Exhibit No. 14, which exhibit is attached to and made a part of Findings of Fact and Conclusions of Law and designated therein as Exhibits A, B, C and D. [115]
4. Plaintiff's Exhibit No. 15.
5. Plaintiff's Exhibits Nos. 16 to 19, inclusive.
6. Plaintiff's Exhibit No. 20.
7. Plaintiff's Exhibits Nos. 22 and 23.
8. Plaintiff's Exhibits Nos. 25 to 31, inclusive.

- 9. Defendant's Exhibits A and C.
- 10. Defendant's Exhibit T.

Dated this 15th day of October, 1951.

THURMAN L. McCORMICK,  
and  
HAROLD EASTON,  
By /s/ HAROLD EASTON,  
Attorneys for Plaintiff and  
Appellee.

FULCHER & WYNN,  
By /s/ CAROL G. WYNN,  
Attorneys for Defendant and  
Appellant.

[Endorsed]: Filed October 18, 1951. [116]

In the United States District Court, Southern  
District of California, Central Division

No. 5187-WM—Civil

LESTER W. HURLEY,

Plaintiff,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LTD., a Corporation,

Defendant.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Tuesday, November 12, 1946

Appearances:

For the Plaintiff:

FRANK M. GUNTER, ESQ., and  
THURMAN L. McCORMICK, ESQ.

For the Defendant:

FULCHER & WYNN, by  
CHAS. E. R. FULCHER, ESQ., and  
CAROL G. WYNN, ESQ.



LESTER W. HURLEY

the plaintiff herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Lester W. Hurley.

Direct Examination

By Mr. McCormick:

Q. Where do you live, Mr. Hurley?

A. 1409 West 27th Terrace, Independence, Missouri.

Q. What is your business at the present time?

A. I am operator of a Missouri Pacific Hotel and Restaurant in Kansas City.

Q. What was your business prior to engaging in the hotel and restaurant business?

A. I was employed by the Missouri Pacific Railroad in a clerical capacity.

Q. When did you go to work for the Missouri Pacific Railroad Company?

A. August the 4th, 1924.

Q. Did you continue to work for the Missouri Pacific Railroad Company then up until the year 1945?

A. I did; yes, sir.

Q. Were you living in Kansas City, Missouri, in the year [3\*] 1928?

A. I was; yes, sir.

Q. With whom were you living at that time?

A. I was living with my father and my step-mother.

Q. Had your mother died prior to that?

(Testimony of Lester W. Hurley.)

A. She had; yes, sir.

Q. And what was your age at the time of her death?      A. What date was that?

Q. What was your age at the time of your mother's death?      A. 15 years old.

Q. Was it about that occasion when you first obtained your employment with the Missouri Pacific Railroad Company?

A. That is correct; yes, sir.

Q. State what relation you are to Elizabeth J. Price.      A. She is my grandmother.

Q. And what relation are you to George Burton?

A. He is my uncle.

Q. What was the name of your grandmother prior to her marriage to William Price?

A. Her name was Burton.

The Court: Is that your maternal grandmother?

The Witness: Yes, it is, your Honor.

The Court: How many children did your maternal grandmother have?

The Witness: Two, your Honor. [4]

The Court: Who were they?

The Witness: My uncle and my mother.

The Court: That is, George Burton and your mother?

The Witness: Yes, sir.

The Court: How many children did your mother have?

The Witness: One.

The Court: You were the only child?

The Witness: Yes, your Honor.

(Testimony of Lester W. Hurley.)

Q. (By Mr. McCormick): When were you born, Mr. Hurley. A. December 18th, 1908.

Q. Did your grandmother, Elizabeth Price, ever live at any time in Excelsior Springs, Missouri?

A. She did; yes, sir.

Q. During what period of time was she residing in Excelsior Springs?

A. About 1915, '16, around in there.

Q. Did William Price at any time live in Excelsior Springs? A. He did; yes, sir.

Q. Was your grandmother at any time employed by William Price? A. She was.

Q. And in what capacity?

A. As housekeeper.

Q. After having been employed by William Price for a [5] period of time as a housekeeper, were Elizabeth Price and William J. Price married?

A. They were; yes, sir.

Q. And about what year was that?

A. That was about 1917, 1916 or '17, around there.

Q. And after their marriage did they continue to live in Excelsior Springs? A. No, sir.

Q. Did they then move to Los Angeles?

A. They moved to Los Angeles.

Q. Do you know about what year that they removed to Los Angeles? A. About 1917.

Q. Now, Mr. Hurley, during the time that they lived in Los Angeles did you ever visit your grandmother and her husband in Los Angeles?

A. I did.

(Testimony of Lester W. Hurley.)

Q. And over what period of time or how frequently?

A. My mother and I made three trips to California, in 1920, '21 and '22.

Q. And did you get quite well acquainted at that time with William Price? A. I did; yes, sir.

Q. Did William Price have any children to your knowledge?

A. None that I know of; no, sir. [6]

Mr. McCormick: These have been previously marked and I would like to have the order of marking them, if I may, as Plaintiff's Exhibit 1 there, Plaintiff's Exhibit 2, and so on in order.

The Court: At this time we will take the morning recess of five minutes.

(Short recess.)

Mr. McCormick: I now offer to the court for the purpose of identification certain stock certificates.

The Court: Just hand them to the clerk and they will be marked.

The Clerk: I have marked for identification as Plaintiff's Exhibit No. 1, Certificate No. A8756 for 100 shares of common stock, Southern California Edison Co.; No. 2 for identification, 100 shares of common stock, Southern California Edison Co., Certificate No. A8755; No. 3 for identification, certificate for 100 shares of Southern California Edison Co. common stock, Certificate No. A8754.

The Court: Those are all preceded by "A," are they?



(Testimony of Lester W. Hurley.)

The Witness: Yes, your Honor.

The Clerk: Plaintiff's Exhibit 4 for identification, 100 shares of common stock, Certificate No. A8753; Plaintiff's Exhibit 5 for identification, Certificate for 100 shares of Southern California Edison Co. common stock, Certificate No. A8752; as Plaintiff's Exhibit for [7] identification, Certificate for 67 shares of Southern California Edison Co. common stock, Certificate No. AO-59635; and Plaintiff's Exhibit 7 for identification, certificate for eight shares of Southern California Edison common stock, Certificate No. AO-59630.

Q. (By Mr. McCormick): Now, Mr. Hurley, I present to you for the purpose of examination Plaintiff's Exhibits 1 to 7, inclusive, and will ask you to take a look at the assignment that is attached to the back of each of these certificates and tell the court whether or not the purported signature that appears upon that instrument is your signature.

A. No, sir.

Q. Now having examined each of the assignments and power of attorney, you say that no one of these certificates bears your signature?

A. That is correct, sir.

Mr. McCormick: I offer into evidence Plaintiff's Exhibits 1 to 7, inclusive.

The Court: Is there objection?

Mr. Wynn: No objection.

The Court: Plaintiff's Exhibits 1 to 7, inclusive, for identification are received into evidence. According to my notes they aggregate only 565 shares.









For Value received, hereby sell, assign and transfer unto

\_\_\_\_\_

\_\_\_\_\_ Shares  
of the Capital Stock represented by the within Certificate, and do  
hereby irrevocably constitute and appoint

\_\_\_\_\_ Attorney  
to transfer the said stock in the books of the within named Company  
with full power of substitution in the premises.

Dated \_\_\_\_\_ 19\_\_

In Presence of \_\_\_\_\_

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE  
OF THE CERTIFICATE. IN EVERY PART THEREOF WITHOUT ALTERATION OR RE-ASSIGNMENT OR ANY CHANGE THEREIN.

FORM A.

For value received  
assign and transfer to

J. Brice and George E. Ruston  
AS JOINT TENANTS WITH FULL RIGHTS OF SURVIVORSHIP

Dated

FEB 19 1929

Witness

Amelia Ruston





# Assignment of Stock and Irrevocable Power of Attorney

14-28341

For value received Elizabeth J. Price hereby sell, assign and transfer unto  
MRS. ELIZABETH J. PRICE AND GEORGE E. BURTON, AS JOINT TENANTS, WITH FULL RIGHTS

OF SURVIVORSHIP.

ONE HUNDRED (100) \_\_\_\_\_ shares

of the COMMON Capital Stock of THE SOUTHERN CALIFORNIA EDISON COMPANY

standing in my name on the books of said \_\_\_\_\_, and do hereby  
irrevocably constitute and appoint \_\_\_\_\_

\_\_\_\_\_, Attorney, to transfer the said  
stock on the books of the said Company, with full power of substitution in the premises.

DATED \_\_\_\_\_, 19\_\_\_\_

IN PRESENCE OF

Elizabeth J. Price X  
George E. Burton X  
Elizabeth J. Price X  
George E. Burton X

Signatures of \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_  
guaranteed. \_\_\_\_\_  
by \_\_\_\_\_ Cashier.  
The Brotherhood State Bank  
Admitted November 12, 1946.





(Testimony of Lester W. Hurley.)

Mr. McCormick: That is an error in the designation of the number of shares. [8]

The Court: Five of them for 100 shares each; those are Exhibits 1 to 5, inclusive; and, according to my notes, as I understood, Exhibit 6 is for 57 shares or 67 shares?

Mr. McCormick: 67 shares.

The Clerk: Yes. I misread the certificate, your Honor. It is for 67 shares.

The Court: 67. Then Exhibit 7 is for eight shares, which would be a total of 575 shares of common.

Mr. McCormick: That is correct, your Honor.

Q. With reference to these certificates designated Exhibits 1 to 7, I will ask you to state, Mr. Hurley, when you first learned of the existence of these shares of stock?

A. March the 18th, 1924.

Q. From whom did you secure that information?

A. I secured it from you.

Q. At the time that you secured that information did you examine the stock report furnished by the California Edison Co.?

A. I did; yes, sir.

Mr. McCormick: I offer to the clerk for purpose of identification a stock record dated March 14, 1944, and bearing the name of O. V. Showers.

The Court: It consists of three pages?

Mr. McCormick: Three pages, your Honor.

The Clerk: 8 for identification. [9]

Q. (By Mr. McCormick): I call your attention

(Testimony of Lester W. Hurley.)

to Plaintiff's Exhibit 8, Mr. Hurley, and ask you to state if that is the stock record which you received and examined on March 18, 1944?

A. Yes, sir; that is correct.

Q. And it was from that record that you secured the information as to the fact that these 575 shares of stock had been placed in your name and thereafter transferred out of your name?

A. That is correct; yes, sir.

Mr. McCormick: I would also like to add to my offer with respect to Exhibits 1 to 7 that I am offering the notations that appear upon the back of this instrument, as well as the face of the assignment and power of attorney.

The Court: I assume from the fact that your offer was unrestricted, that it covers the entire document in all particulars.

Mr. McCormick: That was the intention, your Honor.

Q. Now, Mr. Hurley, after you secured this information with respect to the issuance of this stock what did you then do, if anything?

A. I notified the Southern California Edison by wire to make no further transfer of the stock.

Q. And after having so notified them by wire, did you follow that notification up with a formal written verified [10] notice of the fact that this stock had been transferred out of your name in fraud of your rights? A. I did; yes, sir.

Mr. McCormick: I offer to the clerk for the

(Testimony of Lester W. Hurley.)

purpose of identification a notice bearing date of March 20th, 1944.

The Clerk: 9 for identification.

Q. (By Mr. McCormick): I call your attention, Mr. Hurley, to Plaintiff's Exhibit 9 and ask you to state if that is the notice that was sent to the Southern California Edison Co. on the 20th day of March, 1944?

A. Yes, sir; that is right.

Mr. McCormick: I offer into evidence Plaintiff's Exhibit No. 9.

The Court: I take it that is a copy?

Mr. McCormick: It is a copy, your Honor, yes.

The Court: Is there objection?

Mr. Wynn: No objection.

The Court: Plaintiff's Exhibit 9 for identification is received into evidence.

## PLAINTIFF'S EXHIBIT No. 9

### Notice

Notice Is Hereby Given to the Southern California Edison Co. Ltd. and all officers, transfer agents and servants, that certificates No. AO 59630; AO 59635 and A 8752 to 8756, inclusive, issued under date of November 20th, 1928, to Elizabeth J. Price, George E. Burton and Lester Hurley, as joint tenants, and thereafter cancelled under date of February 19, 1929, were illegally, unlawfully, and fraudulently cancelled without the knowledge, consent or authorization of Lester Hurley, and

(Testimony of Lester W. Hurley.)

without the true and legal endorsement of Lester Hurley on said certificates.

You and each of you are further notified that certificates No. AO 61852 and A 9230 to A 9234, inclusive, issued to Elizabeth J. Price and George E. Burton under date of February 19, 1929, in the place and stead of the certificates first above described, were illegally and unlawfully issued without the surrender of the original certificates properly endorsed, and therefore constitute a fraud upon Lester Hurley and his true and lawful ownership in the 575 shares of common stock represented thereby.

You and each of you are further notified and requested to make no further transfers of the certificates last above described until the legal right and ownership of the undersigned stockholder in said certificates has been adjudged and determined.

Signed and dated at Kansas City, Missouri,  
March 20th, 1944.

.....

State of Missouri,  
County of Jackson—ss.

On this 20th day of March, 1944, before me, N. R. Fischer, a Notary Public, personally appeared Lester Hurley to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.



(Testimony of Lester W. Hurley.)

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in Kansas City, Missouri, the day and year last above written.

.....,

Notary Public.

Admitted November 12, 1946.

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The Clerk: So marked.

Mr. McCormick: I also desire at this time to offer into evidence Plaintiff's Exhibit 8.

Mr. Wynn: No objection.

The Clerk: So marked.

The Court: Plaintiff's Exhibit 8 for identification is [11] received into evidence.



## PLAINTIFF'S EXHIBIT No. 8

Common Stock account of: Mrs. Elizabeth J. Price and George E. Burton as Joint Tenants.

Certificate No.	No. Shares	Date Issued	Date Cancelled	Remarks
AO 61852	75	2/19/29		Transferred from Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley, J. T. Certificates AO 59630 for 8 shares and AO 59635 for 67 shares.
A9230	100	2/19/29		Transferred from Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley, J. T. Certificates, A8752, 3, 4, 5 and 6, for 100 shares each.
A9231	100	2/19/29		Transferred from William Price and Mrs. Elizabeth Price, J. T. See certificate AO 59631 for 48 shares.
A9232	100	2/19/29		
A9233	100	2/19/29		
A9234	100	2/19/29		
AO 62247	48	3/ 5/29		

Total 623 shares (still outstanding)

Common Stock account of: Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley, Joint Tenants.

Certificate No.	No. Shares	Date Issued	Date Cancelled	Remarks
AO 59630	8	11/20/28	2/19/29	Transferred to Mrs. Elizabeth J. Price and George E. Burton as Joint Tenants. See certificate AO 61852 for 75 shares. These certificates were endorsed by all three tenants and signatures guaranteed by Cashier of the Brotherhood State Bank.
AO 59635	67	11/20/28	2/19/29	Transferred to Mrs. Elizabeth J. Price and George E. Burton as Joint Tenants. See certificates A9230, 1, 2, 3 and 4 for 100 shares each. These certificates endorsed by all three with all signatures guaranteed by Cashier of the Brotherhood State Bank.
A8752	100	11/20/28	2/19/29	
A8753	100	11/20/28	2/19/29	
A8754	100	11/20/28	2/19/29	
A8755	100	11/20/28	2/19/29	
A8756	100	11/20/28	2/19/29	

Common Stock account of: William Price and Mrs. Elizabeth J. Price as Joint Tenants.

Certificate No.	No. Shares	Date Issued	Date Cancelled	Remarks
AO 59631	48	11/20/28	3/ 5/29	Transferred to Mrs. Elizabeth J. Price and George E. Burton as Joint Tenants. See certificate number AO 62247. Certificate was endorsed by Mrs. Elizabeth J. Price. (William Price was deceased.)

Note: Our records indicate that Mrs. Elizabeth J. Price presented the stock in person to our Transfer Dept. for transfer.

Common Stock account of: Mrs. Elizabeth Jane Price and George E. Burton and Lester Hurley as Joint Tenants.

Certificate No.	No. Shares	Date Issued	Date Cancelled	Remarks
AO 59759	44	11/26/28		Transferred from Elizabeth Jane Price. See certificate LO 63631 for 11 shares \$100 Par.
AO 59770	44	11/26/28		Transferred from certificate AO 56349 for 40 shares in name of Mrs. Elizabeth J. Price and certificate AO 48754 for 4 shares in name of Elizabeth Jane Price.

Total 88 shares (still outstanding)

Common Stock account of: Elizabeth Jane Price.

Certificate No.	No. Shares	Date Issued	Date Cancelled	Remarks
LO 63631	11	10/28/24	11/26/28	This certificate for \$100 par value, equivalent to 44 shares of our \$25 Par stock. Transferred to Mrs. Elizabeth Jane Price and George E. Burton and Lester Hurley as joint tenants. See certificate AO 59759. Certificate was endorsed by Elizabeth Jane Price.
AO 56349	40	7/ 7/28	11/26/28	Issued "Mrs. Elizabeth J. Price"—\$25 Par. Transferred to Mrs. Elizabeth Jane Price and George E. Burton and Lester Hurley as joint tenants. See certificate AO 59770. Certificate endorsed by Elizabeth Jane Price.
AO 48754	4	5/18/28	11/26/28	\$25 Par. Transferred to Mrs. Elizabeth Jane Price and George E. Burton and Lester Hurley as joint tenants. See Certificate AO 59770. Certificate endorsed by Elizabeth Jane Price.

Note: Our records indicate that Mrs. Elizabeth J. Price presented the stock in person to our Transfer Dept. for transfer.

6% Preferred Account of: Mrs. Elizabeth Jane Price and George E. Burton and Lester Hurley as Joint Tenants.

Certificate No.	No. Shares	Date Issued	Date Cancelled	Remarks
A10216	100	11/26/28		Transferred from Elizabeth Jane Price. See Certificates AO 81326, AO 83832 and AO 84607.
AO 86998	11	11/26/28		Transferred from Elizabeth Jane Price. See certificates LO 19406 and LO 19407 for 10 shares each of \$100 Par Value stock.
AO 87011	80			

Total 191 shares (still outstanding)

6% Preferred Account of: Elizabeth Jane Price.

Certificate No.	No. Shares	Date Issued	Date Cancelled	Remarks
AO 81326	41	5/19/28	11/26/28	Transferred to Mrs. Elizabeth Jane Price and George E. Burton and Lester Hurley as Joint Tenants (\$25.00 Par Value). See Certificates A10216 and AO 86998. Certificates endorsed by Elizabeth Jane Price.
AO 83832	33	7/24/28	11/26/28	Both certificates (\$100 Par Value) equivalent to 80 shares. Transferred to Mrs. Elizabeth Jane Price and George E. Burton and Lester Hurley. See certificate AO 87011. Certificates endorsed by Elizabeth Jane Price.
AO 84607	37	8/18/28	11/26/28	
LO 19406	10	2/12/26	11/26/28	
LO 19407	10	2/12/26	11/26/28	

Note: Our records indicate that Mrs. Elizabeth J. Price presented the stock in person to our Transfer Dept. for transfer.

O. V. Showers/K  
March 14, 1944.

Admitted November 12, 1946.





(Testimony of Lester W. Hurley.)

Q. (By Mr. McCormick): Now, Mr. Hurley, when did your grandmother die, Mrs. Price?

A. December the 27th, 1943.

Q. And during the lifetime of your grandmother, in conversations had with her, did she ever at any time tell you anything with respect to her property or holdings?

Mr. Wynn: Just a moment. We object to that as hearsay as against this defendant, statements made out of our presence.

The Court: Is that offered to prove the truth of what she said, or merely to prove what she said?

Mr. McCormick: Just merely to prove that the statement was made.

The Court: A verbal fact?

Mr. McCormick: That is right.

The Court: Objection overruled. For that purpose the statement will be admitted.

The Witness: I did not quite get the question.

Mr. McCormick: As to whether she had at any time in conversation with you made any statement to you relative to any property or interest that she held.

A. She said she had an interest in the Southern California Edison Company; yes, sir.

Q. Did your grandmother at any time ever make a statement to you that you had interests in the Southern California Edison [12] Company?

A. No, sir; she never did.

Q. Was there any other statement made by your grandmother at any time relative to whether or not

(Testimony of Lester W. Hurley.)

you would or might at any time benefit from any property or interest that she might have?

A. She said that I might benefit from some of her property at the time of her death, depending on how she felt toward me at that time.

Q. What, if any, statement did she make at that time or at any other time relative to any action on your part in the matter of running her business affairs or inquiring into her activities and business interests?

A. She informed me that, inasmuch as she had in mind benefiting me at the time of her death, gave me no right to pry into her business affairs or run her business.

Q. And she wanted no privilege of that kind to be asserted or undertaken by you?

A. That is correct; yes, sir.

Q. Did you at any time during the lifetime of your grandmother make any effort at all to ascertain what property she had or what interests that she might have in the Southern California Edison Company or any other company? A. No, sir.

Q. Did your grandmother ever at any time ask you to [13] assign or transfer to her or to Mr. Burton any shares of stock in the Southern California Edison Company?

A. No, sir; she did not.

Q. Did your Uncle George Burton ever at any time ask you to assign or to transfer any interest in the stock that you might have in the Southern California Edison Company? A. No, sir.

(Testimony of Lester W. Hurley.)

Q. Did you ever discuss with Mr. Burton or Mr. Price any matter pertaining to stock in the Southern California Edison Company?

A. Not prior to 1944.

Q. That was during the lifetime of your grandmother. But at any time, your answer is not until subsequent to your grandmother's death?

A. That is correct; yes, sir.

Q. Now, you say, I believe, that your grandmother died on December 27, '43?

A. That is correct.

Q. Following the death of your grandmother did you make any inquiry of Mr. Burton as to whether or not there had been any property left by your grandmother? A. I did.

Q. And what, if anything, did Mr. Burton tell you at that time?

A. He told me there was 191 shares of preferred and [14] 88 shares of common stock standing in his and my name.

Q. Did he make any statement at that time relative to the question of whether or not your grandmother left a will? A. He did; yes, sir.

Q. Did you as a result of the fact that she had left a will make any effort to ascertain the terms and conditions of that will?

A. I did; yes, sir.

Q. And what action did you take in that regard? A. I consulted you.

Q. After having consulted me with respect to

(Testimony of Lester W. Hurley.)

the matter of the will, was it your instruction and request that I examine the will?

A. Yes, sir; that is correct.

Q. Was that done on one occasion in your presence? A. Yes, sir; it was.

Q. Do you recall whether or not upon the examination of that will—and did you examine an inventory that was filed at that time in conjunction with the will? A. I did; yes, sir.

Q. Do you recall any information or statements having been given you by your attorney at that time that there seemed to be a conflict or a good deal of uncertainty as between the terms of the will and the inventory?

A. Yes, sir; that is correct. [15]

Q. As a result of that information what, if anything, did you instruct or direct your attorney to do?

A. I instructed you to secure the information from the Southern California Edison Company.

Q. As a result of those instructions it was then that this report was subsequently secured from the Southern California Edison Company?

A. That is correct; yes, sir.

Q. Exhibit No. 8? A. That is correct.

Q. Mr. Hurley, I want you to tell the court whether or not prior to March 18, 1944, that you ever learned from any source or from any individual anything with respect to the existence of these 575 shares of stock in the Southern California Edison Company?



(Testimony of Lester W. Hurley.)

A. No, sir; I never learned a thing about it.

Q. Prior to the death of your grandmother in December, 1943, did you ever secure any dividends from the Southern California Edison Company?

A. No, sir.

Q. Do you now know that dividends were declared by that company and paid during that period of time from 1928 up until 1943?

A. I do now; yes, sir.

Q. Mr. Hurley, are you acquainted with a party by the name of [16] Homer E. Alberti?

A. I am; yes, sir.

Q. Do you know what business or what he was engaged in in the year 1928 or '9?

A. No, I don't, not in 1928 or '29.

Mr. Wynn: Did the reporter get the answer?

The Witness: I said, "No, sir; not in 1928 or '29."

Mr. Gunter: I could not hear it.

Q. (By Mr. McCormick): Did you afterwards learn as to what connection or business he was engaged in during that period?

A. I did; yes, sir.

Q. Was he at that time, as you now know, cashier of the Brotherhood State Bank or an official connected with the Brotherhood State Bank of Kansas City, Kansas?

A. That is correct; yes, sir.

Q. When did you first meet Homer Alberti?

A. In 1933.

(Testimony of Lester W. Hurley.)

Q. Do you have any way in which you can fix or explain as to how you fix that date of having met Mr. Alberti in 1933? A. Yes, sir.

Q. Just state what that is.

A. Well, it was the year I was laid off on the railroad and I had spent considerable time with my grandmother that year. [17] We had lunch there in Kansas City, Kansas, close to the bank, and she took me in the bank and introduced me to him.

Q. Was that the year in which Mrs. Cecilia Burton, the then wife of George Burton, was killed?

A. Yes, sir; that is correct.

Q. Mr. Hurley, in 1929 what was your age?

A. I was 20 years old.

The Court: What is your birth date?

The Witness: December the 18th, 1908.

Mr. McCormick: Is it the position of the defendant to deny that that is the correct age of the plaintiff?

Mr. Wynn: Well, you have showed that. I think we have no contest on that.

Mr. McCormick: Very well, I will avoid introducing these.

The Court: He stated as a matter of family history he was born on December 18, 1908.

Is that what your mother told you?

The Witness: Yes, sir, your Honor; it is.

Q. (By Mr. McCormick): Now, Mr. Hurley, I would like you to state as to what, if any, consideration that you have received from George Burton,

(Testimony of Lester W. Hurley.)

Elizabeth J. Price, or anyone else, or from any source for the alleged or claimed assignment or transfer of these 575 shares of stock.

A. None whatsoever.

Q. Are you acquainted, Mr. Hurley, with Helen Burton? [18]           A. I am; yes, sir.

Q. Is she the daughter of George Burton?

A. Yes, sir.

Q. In 1929 what was her age, approximately?

A. I would say she was around 16 years of age.

Mr. McCormick: I offer for the purpose of identification Dividend Order No. 12742, bearing date of November 19, 1928.

The Clerk: 10 for identification.

Q. (By Mr. McCormick): I call your attention, Mr. Hurley, to Plaintiff's Exhibit 10 and to the dividend order on the usual form of the Southern California Edison Company and ask you to take a look at the signatures appearing thereon and tell the court as to whether or not the purported signature "Lester Hurley" appearing thereon is your signature?           A. No, sir; it is not.

Q. I will ask you to state whether or not you are acquainted with the signature of George Burton?           A. Yes, sir. Fairly well, yes, sir.

Q. State whether or not in your opinion that is his signature?           A. Yes, sir.

Q. Are you acquainted with the signature of your grandmother, Elizabeth J. Price?

A. Yes, sir.

(Testimony of Lester W. Hurley.)

Q. Is the signature on that instrument the signature of [19] your grandmother?

A. Yes, sir.

Q. Now, I will ask you to take a look at the writing, the written portion, written in handwriting, in the body of this instrument where the name "Mrs. Elizabeth J. Price" is inserted in longhand, and then below the printing, the names "Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley," and tell, if you feel that you know, in whose handwriting that is?

A. In my grandmother's, Mrs. Elizabeth Price.

Mr. McCormick: I offer into evidence Plaintiff's Exhibit 10.

Mr. Wynn: No objection.

The Court: Plaintiff's Exhibit 10 for identification is received into evidence.



PLAINTIFF'S EXHIBIT NO. 10

KINDLY SIGN AND RETURN AT ONCE

SOUTHERN CALIFORNIA EDISON COMPANY  
DIVIDEND ORDERDate Nov 19<sup>th</sup> 1928Southern California Edison Company,  
Los Angeles, California.

Gentlemen:

Until this order is revoked in writing, please remit to

Mrs Elizabeth J. Price

at the address given below, by check drawn to his order, the dividend now due, or which may become due on all shares of stock of your company, now or hereafter standing in the name of

Mrs Elizabeth J. Price and George E Burton  
and Lester Hurley

on the books of your company.

Stock how held—

Original Preferred Preferred Series A

Common ☒ (575 shares) Preferred Series B

Classified By	<u>mk</u>	Date	<u>12-11</u>
Seen & Cor By	<u>clp</u>	Date	<u>12-11</u>
Counted By	<u>RP</u>	Date	<u>12-11</u>
Filed By	<u>RP</u>	Date	<u>12-11</u>

X Signature Mrs Elizabeth J Price

Address

X Signature George E Burton

Address

1046 Ann Ave Kansas City, Kansas

Witness:

Signature

Velen Burton

Address

1046 Ann Ave KC Kans.

Address for sending dividends:

1301 West 52nd St  
Los Angeles

Note: Dividend Order must be signed by record owner of stock exactly as the name or names appear on the certificate. If signed by agent, evidence of authority must accompany Dividend Order.

Admitted November 12, 1946.

DEC 11 1928



(Testimony of Lester W. Hurley.)

Does any of your handwriting appear on Exhibit 10?

The Witness: No, sir.

Q. (By Mr. McCormick): Mr. Hurley, you perhaps noted in examining this instrument that the name of "Helen Burton" purports to be on this instrument as a witness to a signature. Do you know whether or not that is the signature of Helen Burton? A. Yes, sir.

The Court: Is it her signature?

The Witness: Yes, sir; it is her signature. [20]

Q. (By Mr. McCormick): I will ask you to state, and that is the Helen Burton that you were referring to a few moments ago as the daughter of George Burton, about 16 years of age?

A. That is correct; yes, sir.

Q. At this time, 1928? A. Yes, sir.

Q. I will ask you to state, Mr. Hurley, how you spell the name Hurley? A. H-u-r-l-e-y.

Q. In looking at this signature do you observe there is any variation in that spelling?

A. The last name is spelled H-u-r-l-e-e-y.

The Court: Do you or any member of your family ever spell the name in that manner?

The Witness: No, sir, your Honor.

The Court: Were you ever known by the name spelled in that manner?

The Witness: No, sir, your Honor.

Q. (By Mr. McCormick): Mr. Hurley, are you married at the present time?

A. I am; yes, sir.

(Testimony of Lester W. Hurley.)

Q. Have you been at any time previously married?      A. Yes, sir; I have.

Mr. McCormick: Your Honor, at this time I would like to [21] request that permission be granted to remove some original exhibits that were attached to a deposition that was taken in this case, for the purpose of enabling us to introduce them in their order, as they constitute signatures which are admitted signatures which we desire to introduce for the purpose of comparison or basis of comparison.

The Court: Does either party expect to offer the depositions?

Mr. McCormick: It would only be, as far as the plaintiff is concerned, a portion of the deposition possibly offered. I would not offer it, except—just a moment.

(Counsel conferring.)

Mr. Wynn: You are speaking of a deposition of Mr. Burton, are you?

Mr. McCormick: Yes, I am.

Mr. Wynn: Mr. Burton is here in court.

Mr. McCormick: No, it will not be offered.

Mr. Wynn: We have no objection.

The Court: Very well, the exhibits may be detached. In using them, Mr. McCormick, so the record will be clear, give the exhibit number as given in the deposition in identifying the document that you withdraw.



(Testimony of Lester W. Hurley.)

Mr. McCormick: Yes, your Honor. The exhibit itself does not appear to be in there.

Mr. Wynn: It must have been opened, if the court please. [22] I assume that they are filed with the clerk.

The Clerk: I have no knowledge of them.

The Court: Do you find them, Mr. McCormick?

Mr. McCormick: I have now, your Honor, thank you. I offer to the clerk a statement dated February 19, 1931, consisting of two pages, which is an instrument bearing the signature of Lester Hurley in two places and verified under date of 19th day of February, 1931.

The Court: You have removed that from a deposition, have you?

Mr. McCormick: And that was removed from the deposition of E. R. Cochran, taken at Kansas City, Kansas, on October 19, 1946, and identified in the taking of said deposition as Plaintiff's Exhibit 1.

The Clerk: It will be 11 for identification here.

Mr. Wynn: May I see that instrument before you question the witness?

Mr. McCormick: Yes, indeed you may.

Q. I call your attention, Mr. Hurley, to Plaintiff's Exhibit 11, and I will ask you to take a look at the signatures of Lester Hurley which purport to appear thereon and state to the court whether that does bear your genuine signature?

A. It does; yes, sir.

(Testimony of Lester W. Hurley.)

Q. Does your signature appear on that instrument in two different places? [23]

A. It does; yes, sir.

Q. That is an instrument which is witnessed by "Helen Burton"? A. Yes, sir; it is.

Q. And "Paul Ditzen"?

A. That is right; yes, sir.

Q. That, again, is the same Helen Burton that you were referring to a few minutes ago?

A. Yes, sir; that is correct.

Mr. McCormick: I offer into evidence as basis of comparison Plaintiff's Exhibit 11, and particularly the signatures of "Lester W. Hurley" appearing thereon.

Mr. Wynn: No objection.

The Court: Plaintiff's Exhibit 11 for identification is received into evidence. What is the date of this document?

PH 4-11  
121

I was informed by you that my seniority would not date from April 1st, 1925 but would date from December 7th, 1926. This is the date I was transferred to Report Clerk and not the date I entered service as a Class One Clerk.

In as much as I complied with the Rules of the Company in protesting the seniority date as shown on the Roster of 1926 I believe I am entitled to consideration and that my seniority dates from April 4th, 1925 at which time I became a Class One Clerk and am respectfully requesting that this be changed. The only place where I erred was that I did not protest all future seniority lists. However my interpretation is that the Rule provides only for protesting of seniority dates within sixty days after the first posting, which was done in this case.

Yours respectfully,

*Lester H. Hurley*

I, Lester Hurley, appearing before a Notary Public this the 19th day of February, 1931, and being duly sworn do state that the foregoing statement relative to my seniority standing on the Clerks Roster of the Missouri Pacific Railroad at Kansas City, is a true and correct statement.

WITNESS:

*Lester H. Hurley*

*Aelen Burton*  
*Paul H. Degen*

State of Missouri *Kansas,*  
County of Jackson *Waudolite,* 20

Subscribed and sworn to before me this 19th day of February, 1931 as a true and correct statement.

*Paul H. Degen*  
NOTARY PUBLIC.

*My commission*  
*expires Nov 6th - 1931*





(Testimony of Lester W. Hurley.)

PLAINTIFF'S EXHIBIT No. 11

Kansas City—Feb. 19, 1931

Mr. R. H. Tait,  
Master Mechanic:

Dear Sir:

With reference to my Seniority on Roster of Class One Clerks,—

My service with the Company in clerical positions is as follows:

Employed as Caller—Third Shift. . . . Aug. 4, 1924

Transferred to Caller—First Shift. . . . Aug. 18, 1924

Transferred to Clerk & Messenger. . . . Apr. 4, 1925

Clerk & Messenger position abolished. Aug. 24, 1925

Transferred to Caller—First Shift . . . Aug. 25, 1925

Transferred to Roundhouse Clerk

(Temporary) . . . . . Oct. 26, 1926

Transferred to Report Clerk . . . . . Dec. 7, 1926

When the 1926 Seniority Roster was posted my name did not appear on it. Within the period of sixty days after posting, or about February 27th, 1926, I took the matter up with Mr. A. R. Peterson who was then Shop Grievance man for the Shop and Store Department, for adjustment, advising him my name did not appear on the Seniority list and that I should have been shown as a Class One

(Testimony of Lester W. Hurley.)

Clerk April 4th, 1925. He advised me he would look into the matter and after waiting for some time without any action being taken I again called on him regarding the matter and was advised he would not handle it as I was not a member of the Clerks' Organization but stated he would be glad to handle and adjust the matter if I would join the organization. Under date of October 25th, 1926 I handed him a membership fee of five dollars and hold a receipt showing this was payment for membership in Lodge #284 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. I heard nothing from the application, received no notice as to whether or not I had been accepted and do not know whether or not he made any return to the Brotherhood covering this remittance. Again in December, 1926 I called his attention to this matter but without any results.

My letter to Mr. J. L. Walls, Local Chairman of the Clerks, dated February 4th, 1930, fourth paragraph may be somewhat misleading in as much as I advised I brought this to the attention of Mr. Peterson in December, 1926, at which time he was Local Chairman of the Clerks at the Shop and was advised he could do nothing on account of my not belonging to the Brotherhood, that I immediately paid my assessment into the Brotherhood of Railway Clerks, making application for membership. In as much as I had already made remittance under date of October 25th, 1926 I meant to imply that I again called Mr. Peterson's attention to the fact

(Testimony of Lester W. Hurley.)

that no action had been taken regarding my seniority standing or receipt of membership card.

In as much as I protested this matter personally to Mr. Peterson within the specified limit as provided by Rules governing these matters, I feel I should be placed on the seniority list according to my service as a Class One Clerk, in other words, April 4th, 1925.

Further, on account of not receiving any satisfactory advice, on November 18th, 1930 I took the matter up with Mr. Wills' office direct and requested it be looked into with a view of adjusting the seniority date. Mr. Wills was at that time in possession of transcript record of my service and was no doubt in possession of my entire record as a Clerk. He replied to me under date of December 2nd, his file V-W-60006-5 that the Seniority Roster would be corrected to show my seniority as April 1st, 1925 as a Class one Clerk. However, the PM of January 26th [Balance of copy missing.]

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Mr. McCormick: 1931, your Honor.

The Court: It bears date of February 19, 1931. Did you sign it in these two places on or about that date?

The Witness: Yes, sir, your Honor.

The Court: Did Helen Burton witness it on top of there?

The Witness: Yes, sir; that is correct.

Mr. McCormick: I now offer to the court for

(Testimony of Lester W. Hurley.)

the purpose of identification an application for a license to marry, subscribed and sworn to the 16th day of December, 1927.

The Clerk: 12 for identification. [24]

Q. (By Mr. Hurley): I call your attention, Mr. Hurley, to Plaintiff's Exhibit 12 and ask you to state as to whether or not your signature appears on that instrument? A. Yes, sir; it does.

Mr. McCormick: I offer into evidence Plaintiff's Exhibit 12, showing the signature of "L. W. Hurley," for the purpose of basis of comparison.

Mr. Wynn: No objection.

The Clerk: Plaintiff's 12.

The Court: Plaintiff's Exhibit 12 for identification is received into evidence.



Address *Stephens Co. Okla. 5/16 Scarritt*  
Application No. A *30234* For License to Marry.

STATE OF MISSOURI, } ss.  
County of Jackson, }  
I, *Lester Wm Hurley* (AFFIDAVIT OF MALE)  
of *Kb* County of *Jackson*  
and State of *Mo* party of the first part, desiring to procure a license to marry  
*Florence Marie Marshall* *409 So Bates*  
of *Kb* County of *Jackson*  
and State of *Mo* party of the second part, do hereby solemnly swear that we  
*Dec 18-1926* are of the ages of *21* years and *20* years respectively and that we are both single and unmarried and  
not first cousins, and may lawfully contract and be joined in MARRIAGE  
(SIGN HERE) *L. W. Hurley*  
Subscribed and sworn to before me this *16* day of *Dec*, 192*7*

JOSEPH W. CORDER, Recorder  
By *J. A. Filmer* Deputy.

STATE OF MISSOURI, } ss.  
County of Jackson, }  
I, the undersigned, party of the second part, do hereby solemnly swear that I am  
the person named in the above application for a marriage license and that I am the age of *20* years and  
that I am single and unmarried and may lawfully contract and be joined in MARRIAGE.  
(SIGN HERE) *Florence M. Marshall*  
Subscribed and sworn to before me this *16* day of *Dec*, 192*7*

JOSEPH W. CORDER, Recorder  
By *J. A. Filmer* Deputy.

STATE OF MISSOURI, } ss.  
County of Jackson, }  
I, the undersigned, do hereby solemnly swear that the said party of the second part  
named in the foregoing application for marriage license is personally known to me, and that she is over the age of  
eighteen years and may legally contract said marriage.  
(SIGN HERE) \_\_\_\_\_  
(Address) \_\_\_\_\_  
Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 192*7*

JOSEPH W. CORDER, Recorder  
By \_\_\_\_\_ Deputy.

(Consent of Parent or Guardian to the Marriage of a Minor)

STATE OF MISSOURI, } ss.  
County of Jackson, }  
I, the undersigned, do hereby solemnly swear that I am the \_\_\_\_\_  
of the said party of the \_\_\_\_\_ part, named in the foregoing application for marriage license, and do  
hereby give my consent to \_\_\_\_\_ marriage \_\_\_\_\_

(SIGN HERE) \_\_\_\_\_  
(Address) \_\_\_\_\_  
Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 192*7*

JOSEPH W. CORDER, Recorder  
By \_\_\_\_\_ Deputy.



(Testimony of Lester W. Hurley.)

Q. (By Mr. McCormick): Mr. Hurley, in the matter of your employment with the Missouri Pacific Railroad Company for the years that you testified that you were employed by that company did you have occasion to do considerable writing?

A. Yes, sir.

Q. You were in a clerical department, is that right? A. That is right; yes, sir.

Q. I will ask you to state, Mr. Hurley, as to whether or not you had in the proceedings which were had relative to the stock here in controversy appeared in court and listened to the testimony of George Burton? A. I have; yes, sir.

Q. And did you at that occasion recall his having testified with respect to a transaction that was supposed to [25] have occurred relative to the matter of making assignments of 575 shares of stock, made up of seven certificates, at the Brotherhood State Bank in the presence of Mr. Homer E. Alberti? Do you recall his having so testified?

A. Yes, sir.

Q. Upon that occasion it was related that Mr. Homer Alberti, an officer of the bank, was present and that your grandmother, Elizabeth J. Price, George E. Burton and his wife, Cecelia Burton, met you at the bank; do you recall such testimony?

A. Yes, sir.

Q. Now I will ask you to state, Mr. Hurley, whether or not that you ever met your uncle, George Burton, and your grandmother, Elizabeth J. Price, at the Brotherhood State Bank at any

(Testimony of Lester W. Hurley.)

time on any occasion?           A. I never did.

Q. Do you know as to what the hours were for banking in Kansas City, Kansas, during the year '29?

A. Well, generally speaking, the banking hours were from 9:00 to 3:00. I think through the years some of them closed earlier than that.

Q. Now, was it a practice for the banks to be closed there on Saturday afternoon?

A. Yes, sir. As far as I know, they all closed.

Q. Mr. Hurley, you know when Mr. William Price was [26] buried?           A. Yes, sir.

Q. When was that?

A. January the 19th, 1929.

Q. And he was buried in a cemetery in Kansas City, Missouri?

A. That is correct; yes, sir.

Q. Did you attend the funeral of William Price?

A. I did.

Q. When was the last time that you recall ever having seen William Price during his lifetime?

A. In 1921.

Mr. McCormick: I offer to the clerk for the purpose of identification——

The Witness: May I correct that last statement? It was 1922 was the last time I saw him.

Mr. McCormick: 1922, yes. I offer to the clerk for the purpose of identification Dividend Order No. 12743.

The Clerk: 13 for identification.

Q. (By Mr. McCormick): Mr. Hurley, I call to



(Testimony of Lester W. Hurley.)

your attention Plaintiff's Exhibit 13 and ask you to take a look at the various signatures thereon and state to the court as to whether or not your signature appears upon that document at any place?

A. No, sir; it does not.

Q. I ask you to note the handwriting in that instrument, [27] which bears date of November 22, 1928, where it is written "Mrs. Elizabeth Jane Price" in longhand, and then further down on the instrument, "Mrs. Elizabeth Jane Price and George E. Burton and Lester Hurley," and state whether or not you know the handwriting.

A. Well, I would say the "Mrs. Elizabeth Jane Price" at the top portion of the document is in my grandmother's writing; and it seems that "Mrs. Elizabeth Jane Price" there is in her handwriting.

The Court: Where it next appears?

The Witness: Yes, sir; where it next appears in this line.

Q. (By Mr. McCormick): I will ask you to state whether or not that instrument does bear the signature of Elizabeth J. Price, in your opinion?

A. In my opinion, it does; yes, sir.

Q. And George Burton?

A. Yes, sir; that is his signature.

Q. I will ask you to also note, Mr. Hurley, that there appears to be a signature over here to the side of a party by the name of "R. N. Jones." Do you know or have you ever been acquainted with a party by the name of R. N. Jones?

A. No, sir.

(Testimony of Lester W. Hurley.)

Q. I believe your testimony was that this signature appearing on this instrument is not your signature? [28]

A. That is correct; yes, sir.

Mr. Gunter: Did you ask that question? I did not catch it.

Mr. McCormick: I think I did.

Mr. Gunter: I beg your pardon. I had a mental reservation to call it to your attention.

The Court: Do you offer Exhibit 13 into evidence?

Mr. McCormick: Just a moment, your Honor. Yes, I offer now Exhibit No. 13 into evidence.

Mr. Gunter: No objection.

The Court: Plaintiff's Exhibit 13 for identification is received into evidence.

The Clerk: So marked.

KINDLY SIGN AND RETURN AT ONCE

12743

SOUTHERN CALIFORNIA EDISON COMPANY  
DIVIDEND ORDERDate Nov 22nd 1928Southern California Edison Company,  
Los Angeles, California.

Gentlemen:

Until this order is revoked in writing, please remit to

Mrs Elizabeth Jane Price

at the address given below, by check drawn to his order, the dividend now due, or which may become due on all shares of stock of your company, now or hereafter standing in the name of

Mrs Elizabeth Jane Price and George E. Burton  
and Lester Hurley  
on the books of your company.

Stock now held—

Original Preferred Preferred Series A

Common ☒ (88 shares) Preferred Series B ☒ (191 shares)

Classified By	77K	Date	12-11
Screened Out By	015	Date	12/11
Entered on Ledger By		Date	

X Signature Mrs Elizabeth Jane Price  
Address 1301 West 52nd St Los AngelesX Signature George E. Burton  
Address 1046 Penn Ave Kansas City KanX Signature Lester Hurley  
Address 7716 S Carrett. R6 Mo

Witness:

Signature A. J. JonesAddress 3539 Fairfield Ave

Address for sending dividends:

1301 West 52nd Street  
Los Angeles

Note: Dividend Order must be signed by record owner of stock exactly as the name or names appear on the certificate. If signed by agent, evidence of authority must accompany Dividend Order.

Admitted November 12, 1928.

V

NOV 11 1928





Q. (By Mr. McCormick): Now, Mr. Hurley, following the trial which was had in United States District Court in Kansas, state whether or not there was issued to you by the Southern California Edison Company 50 per cent interest in the 575 shares of stock concerning which we have been introducing this testimony?

A. There was; yes, sir.

Q. State whether or not promptly following the conclusion of those proceedings that you made demand upon the Southern California Edison Company.

Mr. Wynn: I object to that as calling for his conclusion whether it was "promptly" or not. He may testify as to what he did. [29]

Q. (By Mr. McCormick): Well, just state, if you will, as to whether or not——

A. Yes, sir.

Q. ——you did make such a demand.

A. Yes, sir.

Q. I will also ask you to state, if you will, whether or not the Southern California Edison Company has complied with that request and demand to pay you the dividends, your interest or share of the dividends that have accumulated on this stock from 1928.

Mr. Gunter: It is stipulated that they did not, so I do not think that you need go into that.

Mr. McCormick: Very well.

The Court: Was the demand made in writing?

Mr. McCormick: Yes, your Honor; there was a letter in the matter.

(Testimony of Lester W. Hurley.)

Mr. Wynn: It is covered by the pre-trial stipulation.

Mr. McCormick: The stipulation, I believe, covers that matter, as Mr. Gunter has just called my attention to.

Mr. Gunter: The copy of the demand is not in the pre-trial stipulation. If you have it, perhaps, I think that is what the court is referring to.

Mr. McCormick: You have the original, I expect.

Mr. Wynn: What is the date, Mr. McCormick?

Mr. McCormick: October 15, 1945. [30]

Mr. Wynn: No, I do not believe I do.

Mr. Gunter: The substance of it is stipulated to in the pre-trial stipulation.

The Court: Perhaps you might look it up during the noon recess.

Mr. McCormick: Yes. Pardon me for the delay.

The Court: Before we recess, Mr. Wood, did you have a motion to make?

(Interruption for other court proceedings.)

Mr. McCormick: I now offer to the clerk for the purpose of identification a certified copy of Findings of Fact and Conclusions of Law and Judgment in the suit of George E. Burton versus Lester W. Hurley in case No. 4974-Civil in said court.

The Court: Is that offered into evidence?

Mr. McCormick: I offer it for identification, your Honor. Well, I offer it into evidence.

Mr. Wynn: To which we object, if the court please, as not being in any way binding upon this

(Testimony of Lester W. Hurley.)

defendant, an action to which this defendant was not a party.

The Court: Are you offering it for the purpose of binding the defendant here by the findings?

Mr. McCormick: Your Honor, I would like to offer it for all purposes.

The Court: Very well, let it be marked for identification [31] at this time and the court will reserve ruling on it.

The Clerk: 14 for identification.

Mr. McCormick: You may inquire.

Mr. Wynn: If the court please, I would prefer to await the afternoon session to begin cross-examination.

The Court: Is there any objection to resuming at 1:30, gentlemen?

Mr. Wynn: No. I think we can make it.

Mr. McCormick: No, no objections, your Honor.

The Court: Very well, we will recess the trial at this time until 1:30. You may step down. Court will adjourn.

(Whereupon, an adjournment was taken until 1:30 o'clock p.m. of the same day, Tuesday, November 12, 1946.) [32]

Tuesday, November 12, 1946, 1:30 P.M.

Mr. McCormick: I now present to the clerk for purposes of identification a letter addressed to "Southern California Edison Company, Ltd., Edison Building, Los Angeles, California," dated Oc-



tober 15, 1945, together with enclosure contained therein, being an opinion of the United States District Court for the District of Kansas, First Division, in the case of George E. Burton versus Lester Hurley and Southern California Edison Company, Ltd., a corporation, defendants, No. 4974-Civil.

The Clerk: 15 for identification.

The Court: Did you wish those both marked as one exhibit?

Mr. McCormick: They are related. At any rate, the enclosure was made with the letter. If there is no objection.

Mr. Wynn: Well, I think yes, there is an objection as far as the admission of the Opinion of the District Court of Kansas is concerned.

The Court: It is not offered into evidence as yet.

Mr. Wynn: Oh, no, no. As far as identification is concerned, no objection.

The Clerk: It will be 15 for identification.

Mr. Gunter: I am wondering, in view of the fact counsel has indicated he is going to object to part of it, whether it would not serve the court better, for identification, if we mark them separated, and if Mr. McCormick wants to offer [33] them collectively, he refer to them at that time. Whatever the court wishes in that regard.

The Court: Yes, I think well of the suggestion. Let the letter be marked Exhibit 15 for identification and the opinion enclosed or attached thereto be marked Plaintiff's Exhibit 16 for identification.

(Interruption for other court proceedings.)



Mr. McCormick: Mr. Hurley, will you take the stand?

LESTER W. HURLEY

(Recalled)

Direct Examination

(Resumed)

By Mr. McCormick:

Q. I call your attention to Plaintiff's Exhibit 15, being a letter dated October 15, 1945, addressed to "Southern California Edison Company, Ltd., Los Angeles, California," and ask you to state if that is a copy of a letter sent the Edison Company under that date, at your request, on your behalf by your counsel?           A. Yes, sir.

Mr. McCormick: I offer into evidence Plaintiff's Exhibit 15.

Mr. Wynn: No objection.

The Court: Plaintiff's Exhibit 15 for identification is received into evidence.

(Testimony of Lester W. Hurley.)

PLAINTIFF'S EXHIBIT No. 15

October 15, 1945.

Southern California Edison Company, Ltd.,

Edison Building,

Los Angeles, California.

Attention: Mr. B. F. Woodward, General  
Solicitor.

Re: Hurley Dividends.

Gentlemen:

I am enclosing herewith copy of opinion, findings of fact, conclusions of law and judgment entered in the case of *Burton v. Hurley*, No. 4974-Civil (Kansas).

You will please note that by the opinion of the Court as well as by finding of fact No. 10, the dividend order dated November 19, 1928, which was filed with the California Edison Company on December 11, 1928, is found to be a forgery insofar as it purports to bear the true and genuine signature of Lester Hurley.

You will further note that by conclusion of law No. 4 it is the judgment of the Court that said dividend order dated November 19, 1928, insofar as it purports to be an order of Lester Hurley to pay said dividends to Elizabeth J. Price, is void and of no force and effect.

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 15—(Continued)

It follows from the above that the action of the California Edison Company in paying said dividends as well as the delivery to Elizabeth J. Price of all stock rights that accrued through the years on said stock was illegal and unlawful and constituted a misappropriation of Mr. Hurley's interest therein.

Please understand that I realize full well that no desire existed on the part of the Southern California Edison Company to pay any dividends or deliver any interest to anyone not lawfully entitled thereto. However, the fact remains that as a result and by reason of the forgery perpetrated in this matter the dividends and other interests to which Lester Hurley was legally and lawfully entitled has been diverted and paid to Elizabeth J. Price without any legal and lawful right on the part of the California Edison Company so to do.

In connection with the above, however, I desire to call to your attention the fact that the 575 shares of common stock represented by certificates dated November 20, 1928, and bearing numbers AO59630, AO59635 and A8752 to A8756, inclusive, were purportedly assigned to George E. Burton and Elizabeth J. Price on February 19, 1929, and the signature purporting to be the signature of Lester Hurley by which said assignment was effected was guaranteed by the Brotherhood State Bank of Kansas City, Kansas. It is my thought that in all

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 15—(Continued)

probability no dividends were paid to Elizabeth J. Price or any interest delivered to Elizabeth J. Price connected with said stock between the dates of November 20, 1928, and February 19, 1929, when said purported assignment took place. It follows, therefore, that if such are the facts it is reasonable to assume that the dividends thereafter paid and rights therein granted to Elizabeth J. Price were influenced by the fact that Lester W. Hurley had purportedly parted with his interest by assignment of the stock itself and that his signature effecting said assignment was guaranteed. That the action of the company in paying said dividends through the years following this purported assignment was influenced by and reliance placed upon said purported assignment by Lester Hurley whose signature was guaranteed rather than upon the dividend order purportedly signed by Lester Hurley whose signature thereon was not guaranteed. If this is true then it appears to the undersigned that since said dividends were paid upon the faith and in reliance upon the genuineness of the signature of Lester Hurley which was in fact guaranteed by the Brotherhood State Bank of Kansas City, Kansas, then in event of a loss that accrues to the company by reason of the necessity of paying to Lester W. Hurley the dividends to which he is lawfully entitled immediately creates a definite liability on the part of the Brotherhood State Bank to reimburse



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 15—(Continued)

the company for such loss which was brought about by the guaranty on its part of a spurious or forged signature.

Now I believe that you fully understand that since the signature of Lester Hurley purporting to assign said stock certificates as well as the dividend order has been adjudged by the U. S. District Court for the District of Kansas, which judgment is final, to be a forgery the conclusion is unavoidable that the Brotherhood State Bank is liable to your company for the dividends on these 575 shares which were paid to Elizabeth J. Price in the place and stead of Lester W. Hurley who is lawfully and legally entitled thereto. However, this may be, I desire at this time on behalf of my client Lester W. Hurley to make demand upon the Southern California Edison Company for the payment of all dividends, stock rights and other interests that were due to Lester W. Hurley as the lawful and legal owner as joint tenant with full right of survivorship of the aforesaid 575 shares of common stock in the California Edison Company from November 20, 1928, to and including the 27th day of December, 1943, as well as on stock owned by Lester Hurley in the California Edison between the last above designated dates.

I also desire at this time to ask that you furnish me, at your early convenience, with a statement as reflected by the books of your company showing all

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 15—(Continued)

dividends and stock rights paid and delivered to Elizabeth J. Price on the aforesaid stock as well as other stock standing in the name of Lester W. Hurley from the 20th day of November, 1928, to the date of the death of Elizabeth J. Price, namely December 27, 1943.

Thanking you for your attention to the above matter and for a reply at your early convenience as to the position your company desires to take in this matter, I am

Yours very truly,

THURMAN L. McCORMICK.

TLM/kt

Enc.

Admitted November 12, 1946.

---

Mr. McCormick: I now at this time, if the court please, offer into evidence Plaintiff's Exhibit 16, constituting an [34] enclosure that was made with Exhibit 15 just offered.

Mr. Wynn: To the admission of which we object upon the grounds, first, that it is an opinion in an action to which the Edison Company was not a party and it is not binding upon the Edison Company; and secondly, that said action has been shown

(Testimony of Lester W. Hurley.)

not to involve directly, by pleadings, the dividend orders which are involved in the present action.

The Court: This is a part of the notice that went to the Edison Company?

Mr. Wynn: Part of the enclosure, yes. But the opinion, as such, is not binding upon the Edison Company, is our contention. That it received it, yes; but admissible in evidence in this action, we contend no.

The Court: As I conceive it, the purpose of plaintiff's offer is to show what was brought home to the defendant, irrespective of the truth of what was said, is that it?

Mr. McCormick: Very true, your Honor. And I may further say that the opinion was enclosed with the letter, as I believe I could establish by letters received, at the request of the Edison Company.

The Court: You are not attempting here by this offer, or at least that is not the purpose of it, to attempt to bind the Edison Company by what the judge in the District of Kansas may have said?

Mr. McCormick: Only insofar as under the decision of this [35] court in its final opinion and conclusion should decide as to whether or not such opinion, as rendered, and judgment and findings of fact and conclusions of law—

The Court: Let us not confuse the findings of facts, conclusions of law, and judgment. I have reserved ruling on that.

Mr. McCormick: I understand.

(Testimony of Lester W. Hurley.)

The Court: But the opinion would not be a part of the decision of the court, anyhow.

Mr. McCormick: That is true, your Honor.

The Court: So the sole purpose of your offer here is to show that this letter and the opinion were brought home to the Edison Company.

Mr. McCormick: That is correct, your Honor.

The Court: And not to bind the Edison Company, necessarily, by the truth of what is said either in the letter or the opinion which was enclosed.

Mr. McCormick: That would be the legal effect, I believe, your Honor.

Mr. Wynn: So limited, we have no objection.

The Court: Very well, Exhibit 16 for identification will be received into evidence for the purpose stated.



(Testimony of Lester W. Hurley.)

PLAINTIFF'S EXHIBIT No. 16

Mr. Thurman L. McCormick.

In the United States District Court for the  
District of Kansas—First Division

No. 4974-Civil

GEORGE E. BURTON,

Plaintiff,

vs.

LESTER W. HURLEY and SOUTHERN CALI-  
FORNIA EDISON COMPANY, LIMITED, a  
Corporation,

Defendants.

OPINION

The plaintiff brings this action seeking to quiet title to six certificates representing 575 shares of common capital stock of Southern California Edison Company, Limited, (hereinafter referred to as Edison) alleging that he is the legal and equitable owner and has possession of said stock by virtue of an assignment on February 19, 1929, by the then owners of said stock; that the defendant Lester W. Hurley is asserting ownership of an interest therein, the exact nature of the claim being unknown to the plaintiff; and that the assertion of the claim of the defendant Hurley constitutes a cloud upon the plaintiff's title to said stock.

The defendant Lester W. Hurley denies that the plaintiff is the legal owner of said stock and asserts

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

that he (Hurley) is the owner of an interest therein, and sets up two defenses. First, he denies that he ever executed the instruments of transfer by virtue of which the plaintiff claims ownership of the entire 575 shares of stock. Second, he asserts that at the time the plaintiff alleges the instruments of transfer were executed, he (Hurley) was a minor and if he participated in said transfer and signed the instruments of transfer, he was not advised of and did not know the effect of such transaction; that no consideration was paid to him therefor; and, that if such transaction occurred, it was the result of a conspiracy by Elizabeth J. Price and the plaintiff to cheat and defraud him of his interest in said stock and by reason thereof, the purported assignments and powers of attorney alleged to have been executed by him are void.

The record discloses the following facts. Prior to 1915, William Price lived at Independence, Missouri. His wife was an invalid and Elizabeth J. Burton was employed as a nurse in the Price home. Mrs. Price died about 1912, and thereafter, Elizabeth J. Burton continued in the employment of William Price as his housekeeper for approximately three years. In 1915, said William Price and Elizabeth J. Burton were married, at which time William Price was a man of advanced years and Elizabeth J. Burton was approximately 55 years of age. She had two children by a former marriage,

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

a son, George E. Burton, the plaintiff herein, and a daughter. Her former husband, Robert Burton, died in December, 1908. Immediately after the marriage of Elizabeth J. Burton and William Price, they removed to California where they resided until the death of Price.

Prior to the death of Robert Burton, the daughter of Robert and Elizabeth J. Burton and the sister of George E. Burton, had married and a son, Lester W. Hurley, was born to her on December 18, 1908. In 1924, Lester Hurley's mother died and, therefore, the only heirs of Elizabeth J. Price are her son, George E. Burton, and her grandson, Lester W. Hurley.

There is no indication of any friction or bad feeling between Lester Hurley and his uncle and grandmother, and the grandson, who at an early age had secured employment with the Missouri-Pacific Railway Company, frequently visited in California with his grandmother and his stepgrandfather. George E. Burton, a resident of Kansas City, Kansas, made frequent trips to California to visit his mother and stepfather.

There is no evidence that Mrs. Burton, at the time she entered the employ of William Price, was possessed of any substantial property and it is apparent that William Price was a man of considerable means. During the residence in Califor-



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

nia, William Price invested considerable sums of money in the stock of Edison.

On or about November 20, 1928, the 575 shares of stock involved here stood on the records of Edison in the names of Elizabeth J. Price, George E. Burton and Lester Hurley, as joint tenants with full rights of survivorship, by virtue of a transfer from William Price and Elizabeth J. Price, the then owners of said stock.

William Price died January 5, 1929, in Los Angeles, California. At the time of his death, Elizabeth J. Price and George E. Burton were in Los Angeles and Lester W. Hurley was in Kansas City, Missouri. Elizabeth J. Price and George E. Burton brought the body of William Price to Kansas City, Missouri, from Los Angeles, leaving Los Angeles on January 14, 1929, and arriving in Kansas City, January 17, 1929. The body of William Price was interred at Kansas City, Missouri, on Saturday afternoon, January 19, 1929, and Elizabeth J. Price, George E. Burton and Lester W. Hurley attended the funeral.

Elizabeth J. Price brought the certificates of stock under consideration to Kansas City at the time the body of William Price was brought for interment. An instrument introduced in evidence as plaintiff's exhibit 8, bearing the date of November 19, 1928, purporting to bear the signatures of Elizabeth J. Price, George E. Burton and Lester



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

Hurley, directs the dividends on the stock to be paid to Elizabeth J. Price. This instrument bears the stamped date of December 11, 1928, at the bottom of the instrument, which apparently was the date of its receipt by Edison. Hurley denies that he ever signed or executed this instrument. Under the instrument, Elizabeth J. Price received the dividends on the stock until her death, which occurred December 27, 1943.

Sometime between January 19, 1929, and February 19, 1929, seven instruments designated "Assignment of Stock and Irrevocable Power of Attorney," purporting to bear the signatures of Elizabeth J. Price, George E. Burton and Lester W. Hurley, were executed. These instruments were introduced in evidence as plaintiff's exhibits 1 to 7, inclusive. The plaintiff contends these instruments were regularly and properly executed by the parties. By the terms thereof, the stock involved here was transferred from the names of Elizabeth J. Price, George E. Burton and Lester W. Hurley and re-issued to "Mrs. Elizabeth J. Price and George E. Burton, as joint tenants, with full rights of survivorship," in six certificates of stock. Under these instruments, George E. Burton now claims ownership of the 575 shares of stock. Defendant Hurley denies the genuineness of the signatures on the seven instruments of assignment, purporting to be his signatures, and asserts they are forgeries. No

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

consideration from Elizabeth J. Price or George E. Burton ever passed to Lester W. Hurley for such purported transfers. These seven instruments are undated but show they were received by Edison at Los Angeles on three different dates, viz., Jan. 22 a.m., Feb. 1 a.m., and Feb. 18 p.m., all in 1929. The issue of the six certificates of stock under authority of these instruments was made on February 19, 1929.

The title of the plaintiff in the 575 shares of stock depends upon the validity of these seven instruments. If the instruments are genuine, the title to the stock should be quieted in him. If they are spurious, he has no title to the interest of the defendant Hurley in the stock as it stood on the records of the corporation on November 20, 1928. In analyzing the evidence, the facts upon which the court finds there is, or can be, no dispute will be considered.

1. Upon the death of William Price on January 5, 1929, the 575 shares of stock stood in the names of Elizabeth J. Price, George E. Burton and Lester Hurley, as joint tenants with full rights of survivorship.

2. January 19, 1929, the evident date of the assignments was Saturday and the Brotherhood State Bank at Kansas City closed at 12 o'Clock Noon on that date.

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

3. No consideration of any character was ever paid by Elizabeth J. Price or George E. Burton to Lester W. Hurley, nor was any consideration of any character ever received by Hurley from any other source for the transfer of the interest of Lester Hurley in the 575 shares of stock.

5. The preponderance of the evidence is that Lester W. Hurley had no knowledge that he owned or had any interest in the 575 shares of stock until March 18, 1944.

6. Under the execution of the seven instruments of transfer of the 575 shares of stock between January 19, 1929, and February 19, 1929, the plaintiff had everything to gain and nothing to lose and the defendant Hurley had nothing to gain and everything to lose.

The evidence on whether the signatures of Lester W. Hurley were affixed by Hurley on the plaintiff's exhibits 1 to 7, inclusive, and exhibit 8, is conflicting. The plaintiff testified on his direct examination that the signatures of Lester W. Hurley on exhibits 1 to 7, inclusive, were written by defendant Hurley in his presence at the Brotherhood State Bank in Kansas City (hereinafter referred to as the Bank.) That there were present "Mr. Alberti, my wife (Cecelia C. Burton), my mother (Elizabeth J. Price), and Lester Hurley," and that it occurred sometime during banking hours but he could not



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

remember whether it was in the morning or the afternoon. He was not positive but believed they all used the same pen in signing the seven instruments. He thought Mr. Alberti witnessed all the signatures. He testified that at the time they were in the Bank there was no conversation between his mother, himself and Lester W. Hurley about the transfer of the stock; that he knew of no consideration being paid to Hurley for the transfer; and, that the execution of the seven instruments in the Bank occurred between January 19, 1929, and February 19, 1929.

The memory of the witness with reference to date, time of day and details as to what occurred in the Bank at the time of the purported execution of the seven instruments is very unsatisfactory and throws very little light upon the situation. It leaves much room for speculation, in view of some of the outstanding characteristics of the instruments. These facts are apparent from the face of the instruments: the signatures of George E. Burton and Homer E. Alberti appear to have been written with the same ink which is blue-black in shade; the signatures of Elizabeth J. Price, Lester W. Hurley and Cecelia C. Burton appear to have been written with the same ink which is blue in shade. So the witness is clearly in error in his belief that the signatures all had been written with the same pen. The fact that these characteristics appear leads one definitely to



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

the conclusion that they were written at different times and very likely at different places.

The testimony of Homer E. Alberti is equally very unsatisfactory. He began his testimony with the positive assertion that he remembered the circumstances under which the signatures were affixed to these seven instruments. He testified on cross-examination that he was hazy upon the date, but remembered the occasion "very well," and that he saw Lester W. Hurley affix his signatures to the instruments. Then when certain letters were called to his attention that had passed between the Bank and Edison relative to guaranteeing the signatures of Lester W. Hurley, he showed that he did not remember just how or when the signatures of the various individuals, including his own, were affixed to the instruments, and he entered the field of speculation. The following questions and answers appear in his testimony:

"Q. Mr. Alberti, I notice that there are two signatures of yourself as cashier guaranteeing in one case the signature of Lester W. Hurley and in the other case the signatures of Elizabeth J. Price and George E. Burton. Why was that done separately? A. The fact that there are two separate guaranties leads me to believe that Mrs. Price and George Burton came to my desk on one occasion to affix their endorsements, their signatures, at which time I guaranteed

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

the genuineness of those two signatures, and that Lester W. Hurley came upon another occasion either before or afterwards, I don't know as to that, but that he was not with Mrs. Price and Mr. Burton at the time that they affixed their signatures. Therefore, I guaranteed his signature separately from theirs. Q. Do you have any independent recollection of that? A. I do not. Q. You are basing it entirely on the fact that there are two separate guaranties? A. That is correct, sir. (Examination by the Court:) Q. At the time that they came there to execute these instruments, would you say that Mrs. Price and Mr. Burton and Mr. Hurley all came there together? A. No, sir. It is my best judgment, your Honor, that they did not, but I base that solely on the fact that I did execute separate guaranties. Q. I am going to your personal recollection. Do you remember now, independently of your name as witness, the occasion and whether or not all three of them were there at the same time? A. I don't remember specifically whether all three were there at the same time. Q. Now, you stated a moment ago that you saw each one of them affix the signature? A. Yes, sir. Q. You don't recall then whether Hurley signed at the same time that the others signed, or not? A. I do not. Q. Do you recall at the time

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

that Hurley signed whether or not you had any conversation with him as to the substance of the instrument he was signing? A. I don't remember, sir. Q. Did you consider that it was irregular to insert the name of Mr. Ortman there as one of the grantees in this power of attorney and sign it after the execution of the instrument? A. That name, your Honor, was not inserted by us and did not actually appear on these assignments when I last saw them. Q. You don't know who put that name in? A. No, sir. I have an idea on the subject but I don't know, sir."

\* \* \*

"(Cross-Examination by Counsel:) Q. Have you ever witnessed the signature of an individual without them being present? A. Have I ever done it? Q. Yes. A. I have. I would like to qualify my answer. You asked me the question did I ever witness the signature of an individual where the man was not present. I would say that I did not witness the signature of an individual where he was not present but I have guaranteed the genuineness of the signature."

It is apparent that the witness Alberti had no clear recollection as to what did occur relative to the execution of the seven instruments but it is



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

equally apparent that he relied upon the fact that he witnessed the signature of George E. Burton and guaranteed the signatures of Elizabeth J. Price, George E. Burton and Lester W. Hurley, and that he reasoned that he would not have done those things unless they were all written in his presence.

These seven instruments show that the signatures of Elizabeth J. Price and Lester W. Hurley were both witnessed by Cecelia C. Burton and that only the signature of George E. Burton was witnessed by Alberti. From the receiving stamps placed upon the back of the assignments by Edison and the correspondence, it is evident that Alberti transmitted the purported assignments and they were received in Los Angeles on January 22, but that none of the signatures was guaranteed. They were then returned and Alberti guaranteed the signatures of Elizabeth J. Price and George E. Burton and they were received in Los Angeles on February 1. Later they were returned for the guaranty of the signatures of Lester W. Hurley, after which guaranty by Alberti, they were received by Edison on February 18 and the transfers were then made. No satisfactory excuse is given by Alberti for not guaranteeing all three signatures at one and the same time. All of the signatures were on the assignments before they left Kansas City on January 19 and if the signatures were not guaranteed until February



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

1, they could have been guaranted all at the same time.

The plaintiff and the defendant each produced as a witness a handwriting expert. Both of these experts appeared to be competent in their line of work. Herbert J. Walter, for the plaintiff, testified positively that in his judgment the signatures of Lester Hurley on the disputed instruments were written by the defendant Hurley. E. R. Cochran, for the defendant Hurley, testified as positively that in his opinion the signatures of Lester W. Hurley on the disputed instruments were not written by the defendant Hurley. In connection with other eminent qualities possessed by expert witnesses, one characteristic usually is apparent—they testify in behalf of the side which has had them subpoenaed. The testimony of experts, therefore, is often of very little assistance to the court. They merely emphasize the peculiarities and similarities of writings which are clearly apparent to a close observer of the writings under consideration. In this connection, it is obvious to the most casual observer that in the seven instruments of transfer, the capital letter "H" at the beginning of the Hurley signatures is in no instance like the letter "H" in all the admitted signatures. It is equally apparent that in the signatures of Lester W. Hurley as they appear in all seven instruments, in no instance is there a break between the letters "s" and "t" in the name

(Testimony of Lester W. Hurley.)

**Plaintiff's Exhibit No. 16—(Continued)**

Lester, which does appear in practically all of his admitted signatures.

The testimony of Lester W. Hurley is clear and positive that the signatures purporting to be his signatures on all seven instruments are not his signatures and were not written by him.

Every circumstance surrounding the purported transaction sustains his testimony. The evidence is clear that the defendant, at the time of the purported transfer, did not know he had any interest in the stock claimed to be transferred. There is not one word of testimony in the record that anyone ever had any conversation with him prior to, or contemporaneous with, the purported transfer concerning it. The purported transfer of necessity would have had to occur on or before January 19, 1929, to have permitted it to reach Los Angeles on the morning of January 22, 1929. The 19th day of January, 1929, was Saturday and the Bank closed at 12 o'clock noon that day. The funeral of William Price was in the afternoon of January 19, 1929. Under these circumstances it is extremely unlikely that such transfers were executed on that date. The following day was Sunday and it would not have occurred on that day. No consideration ever passed to Lester W. Hurley for such transfer. By such a transfer he would gain nothing and lose everything he might own in the stock. There was no good or practical reason for such a transfer as far as he was

(Testimony of Lester W. Hurley.)

**Plaintiff's Exhibit No. 16—(Continued)**

concerned. We are not called upon to speculate as to who did affix the name of Lester W. Hurley on these instruments. The question to be determined is whether or not it was done by Lester W. Hurley, and upon this point I conclude that it was not done by the defendant Hurley and that such signatures are spurious.

Exhibit 8 offered by the plaintiff is a purported direction order to pay dividends on the stock under consideration. This instrument purports to have been executed by Elizabeth J. Price, George E. Burton and Lester Hurley. The defendant Hurley denies that the signature on this instrument was written by him. This instrument bears the date of November 19, 1928. The stock record of Edison discloses that the 575 shares of stock, which the dividend direction order purports to cover, were issued November 20, 1928. No good reason is apparent why such a dividend direction order should have been executed on November 19, 1928, by Lester W. Hurley or George E. Burton. But let us examine this instrument. The date and the names in the body of the instrument, the signature of Elizabeth J. Price, the address of George E. Burton, the words "signitures," and "address," the address for sending the dividends, as well as the notation "(575 shares)" all are written in blue-black ink and apparently at the same time and by the same person. While the signatures of George E. Burton and



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

Helen Burton, her address, the signature of Lester Hurley and his address all are written in the same shade of blue ink. The capital letter "H" in the questioned signature in the name Hurley on this instrument more nearly approximates the letter "H" in all the admitted signatures of Lester W. Hurley than any other disputed signature, still it too has a slight defect. But the name Hurley in this signature is improperly spelled, being spelled Hurleey instead of Hurley. Here again we find no break between the letters "s" and "t" in Lester as it appears in practically all of the admitted signatures of Lester W. Hurley.

Helen Burton, the daughter of George E. Burton, testified positively that she saw Lester W. Hurley write the name "Lester Hurleey," as it appears on the instrument, and witnessed that signature. In view of the facts, that she was only sixteen years of age at the date of the instrument, that she had no recollection of the character of the instrument which she testified was signed by Hurley, that the name of Hurley is misspelled on the instrument, that the many habitual characteristics of the admitted signatures of Lester W. Hurley are absent in the disputed signature, coupled with the positive testimony of Hurley that he did not write the disputed signature, and there appearing in the record no good reason why Lester Hurley should have executed such an instrument as to the 575 shares



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

of stock on November 19, 1928, I am of the opinion that the signature on this instrument, purporting to be the signature of Lester W. Hurley, is not his genuine signature and that he did not write it.

Another circumstance, which to the court is very significant, is that the only witness to Lester Hurley's signature to the seven assignments of stock was Cecelia C. Burton, the wife of George E. Burton, now deceased, and the only signature witness to the dividend order, dated November 19, 1928, is the sixteen year old daughter of George E. Burton. It would have been a very easy matter for George E. Burton to have presented these instruments with the name of Lester W. Hurley attached thereto, advising his wife and daughter that Hurley had signed the instruments and that he desired them to witness Hurley's signature.

These conclusions are decisive of the case. However, the defendant has interposed another defense and, under the circumstances surrounding the various phases of the case, this should have the consideration of the court.

The defendant Hurley states in effect that if the court should find against him as to the validity of the signatures, then the court should find that the purported transfer of the 575 shares of stock is void for the following reasons: First, that at the time the purported transfers were executed, he was a minor, twenty years of age, and that upon dis-

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

covery of the true situation he disaffirmed the transaction, and, second, that his signatures to the transfer instruments were obtained by means of fraud practiced upon him by his grandmother, Mrs. Elizabeth J. Price, and his uncle, George E. Burton, and that such fraud was not discovered by him until March 18, 1944.

The evidence discloses that on November 26, 1928, there were issued to Mrs. Elizabeth Jane Price, George E. Burton and Lester Hurley 88 shares of common stock and 191 shares of preferred stock of Edison, as joint tenants with rights of survivorship, and that this stock stood in the names of said parties at the date of the death of Elizabeth J. Price on December 27, 1943. Elizabeth J. Price received the dividends thereon until her death. Elizabeth J. Price was resentful of any inquiry into her business affairs. At times she had sought and procured from Lester Hurley proxies on stock in said corporation. She told him that if she continued to feel kindly toward him he might benefit by her ownership in such stock upon her death. Under such circumstances, it was but natural that Lester W. Hurley would have been very reluctant to make inquiries concerning the stock and in no way to disturb his grandmother concerning it. It is most probable that such proxies concerned only the 88 shares of common and the 191 shares of preferred stock that stood in his name on the records of the

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

corporation and in no way could have had any connection with the 575 shares that had been transferred from his name on the records of the corporation. There is no evidence that anyone ever discussed the ownership of the 575 shares of stock with Lester W. Hurley prior to the death of Elizabeth J. Price. The evidence is clear that Hurley never knew that the 575 shares of stock had ever stood in his name prior to March 18, 1944.

At the time of all of these purported transactions, Lester W. Hurley was a minor. It was clearly the duty of Elizabeth J. Price and George E. Burton, standing in the close relationship they did, which in itself was one of confidence and trust, to explain the transfer in detail to Hurley and to explain in detail the effect of the direction order to pay dividends. This was not done, so far as this record discloses.

Section 38-102 G. S. of Kansas, 1935, reads:

“A minor is bound, not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract and remaining within his control at any time after his attaining his majority.”

The disaffirmance of the transaction is based upon fraud claimed to have been practiced on the minor,



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

Lester W. Hurley, and the cause of action accrued upon his discovery of the fraud which would be March 18, 1944. Whether the disaffirmance of such a contract is within a reasonable time after attaining majority is a question to be determined by the facts surrounding the transaction and the law governing the situation, being a mixed question of law and fact. There was no consideration for the transfer. The defendant Hurley was a minor and had implicit faith in his grandmother and his uncle. By virtue of the purported transfer of the 575 shares of stock, the grandmother gained the dividends on the stock for many years, the uncle would gain the ownership of the stock at his mother's death, and the defendant gained nothing and lost his property. The grandmother, by her attitude concerning her property, had created a situation that discouraged any investigation about her property and business upon the part of the defendant Hurley until her decease.

In *Brown v. Staab et al.*, 103 Kan. 611, 176 P. 113, 114, the court, in passing upon the Kansas statute, *supra*, well expressed the principle in these words:

“\* \* \* The statute declares that he is bound unless he disaffirm within a reasonable time after he attains majority. Much learning has been expended by the courts in determining what, in a given case, will constitute a reason-



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

able time in which to disaffirm. It is said to depend generally upon the circumstances of each case, and sometimes becomes a mixed question of fact and law, and sometimes a mere question of law. It has been held that the question of what constitutes a reasonable time is a question of fact for the determination of the court or jury, dependent upon the nature of the action. *Wiley v. Wilson*, 77 Ind. 596, and *Scott v. Buchanan*, 11 Humph. (Tenn.) 468. The general rule is that a reasonable time does not in any case extend beyond the period of the statute of limitations (*Nathans v. Arkwright*, 66 Ga. 179; 22 Cyc. 553), and the weight of authority seems to be that it is always safe for a court of equity to follow by analogy the statute of limitations."

In *Ralph v. Ball et al.*, 100 Kan. 460, 164 P. 1081, 1082, the court said:

"\* \* \* In this instance the plaintiff did not know and could not know that she had any interest to be promoted by disaffirmance until the death of Grace Ball on April 20, 1900. If the section were to be applied by analogy, she should have two years after that time within which to disaffirm, and she acted within a shorter period. The section has no application, however, because the Legislature chose to limit the time

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

within which disaffirmance may take place, not by counted years, but by reasonableness under all the circumstances. Circumstances may readily be imagined which would warrant disaffirmance five years, and more than five years, after majority."

So in the case at bar, the defendant did not know and had no reason to investigate or inquire into the ownership of the 575 shares of stock until after the death of Elizabeth J. Price. The record discloses that at the very first occasion that would suggest such inquiry, the defendant seized upon it and diligently pursued the investigation and upon the discovery of the true situation, promptly disaffirmed the transfer of the stock purported to have been authorized by him.

Section 60-306 G. S. of Kansas, 1935, on the limitation of action, provides for actions that must be brought within two years as follows:

"An action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

While it is true that inadequacy of consideration alone is insufficient to establish fraud, an utter failure of any consideration for the transfer of valuable property is a strong circumstance when taken with other circumstances in the case tending to show

(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

fraud. Here the defendant, a minor, would be contracting with people of mature years and business judgment in whom he had great confidence. In their dealing with him they were procuring, without consideration, a large amount of valuable property at no expense to themselves.

In *Johnson v. Northwestern Mutual Life Insurance Company*, (Minn.) 26 L.R.A. 187, 191, the court, in passing upon the principle, used this apt language:

“\* \* \* Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties. If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessities. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching. A similar principle applies to all



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No. 16—(Continued)

the relations, where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy which prevents the other from exercising an unbiased judgment—as, for example, parent and child, husband and wife, guardian and ward. \* \* \*

In view of the circumstances as disclosed by the record, even had the defendant Hurley executed the instruments of transfer (which conclusion is not sustained by satisfactory evidence), the entire transaction was so tainted with deception practiced upon the defendant by his grandmother and his uncle, that the transfer of the 575 shares of stock cannot be approved by the court and thus become effective. Even had the defendant Hurley executed the instruments of transfer while a minor, his notice to the corporation under date of March 20, 1944, shown in the record as defendant's exhibit "L," which came to the attention of the plaintiff prior to the bringing of this action, constituted a complete disaffirmance of such transfer within a reasonable time after reaching his majority, upon the discovery that such transfer was claimed.

The Edison Company was originally made a party defendant, but a motion to quash the service on said defendant was sustained prior to the trial of this case, and, therefore, the Edison Company has been disregarded in this opinion.



(Testimony of Lester W. Hurley.)

Plaintiff's Exhibit No.16—(Continued)

Judgment is rendered for the defendant generally, and specifically that he is the owner of an undivided one-half interest in the 575 shares of stock in question. An exception is allowed the plaintiff.

Findings of fact, conclusions of law, and a form of judgment consistent with this opinion may be submitted within fifteen days from the date of filing of this opinion.

.....,

United States District Judge.

Dated this 6th day of June, 1945.

Admitted November 12, 1946.

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Q. (By Mr. McCormick): Now, Mr. Hurley, it has been stated in the courtroom or a question asked today relative to the situation that developed where you were a defendant and appeared [36] in this suit of Burton vs. Hurley in the Kansas court. In that connection I wish to ask you as to whether or not you did file, prior to that suit which was tried in the Kansas court, a suit in Missouri upon which you were unable at the time to obtain service upon the defendant in that suit, Mr. Burton?

A. I did, and that is correct.

Q. And it was after having exhausted your

(Testimony of Lester W. Hurley.)

efforts to bring Mr. Burton into the court in Missouri that this suit which Mr. Burton had filed some weeks subsequent to the filing of your suit, that you did appear and contest the suit in Kansas?

A. Yes, sir; that is correct.

Mr. McCormick: I now present to the clerk for the purpose of identification a letter written by the Southern California Edison Company to the Brotherhood State Bank of Kansas City, Kansas, under date of February 7, 1929, addressed to the "Attention: H. E. Alberti."

The Clerk: 17 for identification.

The Court: I will take up another matter at this juncture.

(Interruption for other court proceedings.)

Mr. McCormick: I now offer into evidence Plaintiff's Exhibit 17, being a letter of the Southern California Edison Company to the Brotherhood State Bank of Kansas City, Kansas and dated February 7, 1929.

Mr. Wynn: No objection. [37]

The Clerk: 17 in evidence.

The Court: Plaintiff's Exhibit 17 is received into evidence.

(Testimony of Lester W. Hurley.)

PLAINTIFF'S EXHIBIT No. 17

Southern California Edison Company  
Edison Building  
Los Angeles, California

February 7, 1929.

Brotherhood State Bank,  
Kansas City, Kansas.

Attention: H. E. Alberti.

Gentlemen:

We have your letter of January 29th and are returning again the assignment on which we asked that you have the signature guaranteed. We have on file in this office, the signature of Mrs. Elizabeth J. Price and George E. Burton but do not have the signature of Lester W. Hurley, in such connection that it would be of use here. Will you please have his signature guaranteed by his bank and return it to us.

In connection with the creating of a joint tenancy, it is impossible to join the parties in ownership using the word "or" between the names as this does not establish ownership definitely in either party. In order that joint tenancy may be created, the parties must be definitely joined in ownership. For that reason, the use of the word "and" is necessary and this is the accepted form by all corporations and the only form that is approved by the New York Stock Exchange for creating a joint tenancy in securities.

(Testimony of Lester W. Hurley.)

The clause appearing in the title: "as joint tenants with full rights of survivorship" is the clause which passes title to the survivor upon the death of one, and when a joint tenancy is created the property belongs to the two parties jointly at all times and not during the life of one only, as suggested in your letter, but the title passes to the survivor upon the death of one without the probate of the estate.

When we have the proper guarantee of signature in this connection, we will be pleased to make the transfer requested.

Yours very truly,

/s/ O. V. SHOWERS,  
Assistant Secretary.

JFE:OS

Ediphoned

Admitted November 12, 1946.

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Mr. McCormick: I now present to the clerk a letter dated February 15th, 1929, addressed to the "Southern California Edison Co., Los Angeles, Calif.," to the "(Attn. O. V. Showers, Asst. Secy.)," signed by "Homer E. Alberti."

Mr. Wynn, do you not have the original of that letter?

Mr. Wynn: No. I compared a copy and I have no objection to its admission.

Mr. McCormick: Thank you.

The Clerk: 18 in evidence.



(Testimony of Lester W. Hurley.)

PLAINTIFF'S EXHIBIT No. 18

Feb. 15th, 1929.

Southern California Edison Co.,  
Edison Building,  
Los Angeles, Calif.

Gentlemen:

(Attn. O. V. Showers, Asst. Secy.)

In keeping with yours of the 7th instant, we have guaranteed the genuineness of the signature of Lester W. Hurley as it appears upon the enclosed assignment blanks, having previously guaranteed the signatures of Elizabeth J. Price and George E. Burton.

We have also changed these assignments at the direction of the interested persons, to read Mrs. Elizabeth J. Price and George E. Burton, as joint tenants, with full rights of survivorship, thus following out your instructions in the matter and thus providing for the automatic reversion of the stock in question to either Mrs. Price or her Son, George Burton, at the time of the death of either one or the other of them.

We believe that the stock in question, already in your possession, is now ready to be assigned and you are instructed to forward the new stock certificates, when issued, direct to Mrs. Price at #1301 West 52nd Street, your city, since Mrs. Price is

(Testimony of Lester W. Hurley.)

returning to her home there, either today or tomorrow. Mr. Burton will also be found at that address during the coming days. However, he may return to Kansas City but that in itself will not affect the status of this matter. We take it for granted that Mr. Burton may maintain his legal residence here. Any further correspondence in connection with this matter will be had direct to Mr. Burton or Mrs. Price at the Los Angeles address.

Yours very truly,

.....,

Cashier.

HEA:MS

Admitted November 12, 1946.

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The Court: Is that a copy of a letter?

Mr. McCormick: Yes, your Honor.

The Court: Are these exhibits which have been taken from a deposition?

Mr. McCormick: No, your Honor. Those that were taken from depositions have heretofore been introduced into evidence.

The Court: Very well. The letter last offered is in evidence now as Exhibit 18.

Mr. Gunter: As the court may observe, a great many of these or, I think, practically all of these do have marks on them as if they were exhibits, but those marks were in the other trial.

(Testimony of Lester W. Hurley.)

The Court: By "the other trial" that would be the trial [38] of the Kansas action?

Mr. Gunter: Yes, your Honor.

Mr. McCormick: Yes, your Honor. You may inquire.

Cross-Examination

By Mr. Wynn:

Q. Mr. Hurley, you first went to work for the Missouri Pacific Railroad when you were 15 years of age? A. That is correct; yes, sir.

Q. And in what capacity at that time?

A. Call boy.

Q. What were your duties as such?

A. Calling engine crews.

Q. Calling them from where, their homes, residences?

A. From the roundhouse to the restaurant close by.

Q. To the restaurant?

A. That is right, restaurant and hotel.

Q. Did you have any duties in the restaurant and hotel? A. No, sir.

Q. So that your duties, then, consisted only of calling these crews from the roundhouse to the hotel? A. That is correct.

Q. And how long did you work in that capacity?

A. To the best of my recollection, about nine months or a year.

Q. So until you were approximately the age of 16 that [39] was your duty?

(Testimony of Lester W. Hurley.)

A. That is correct.

Q. Then you still continued to work for the Missouri Pacific Railroad?

A. That is correct.

Q. And in what capacity then?

A. File clerk.

Q. Where were you so employed?

A. In the master mechanic's office.

Q. And where was that located?

A. The East Bottom shops, East Bottoms, Kansas City, Missouri.

Q. How long did you continue in that employment?

A. As I recall, approximately six months.

Q. And what were your duties there?

A. Filing correspondence.

Q. Anything else?           A. No.

Q. And in filing the correspondence you had to inspect the correspondence to see where it went?

A. Well, I addressed part of it myself.

Q. You addressed it in your own handwriting?

A. That is correct.

Q. That is the out-going correspondence?

A. Yes, sir. [40]

Q. So that your duties consisted of mailing out-going correspondence?           A. That is correct.

Q. As well as filing incoming correspondence or copies of out-going correspondence?

A. That is correct.

Q. Were these files kept under your supervision that you filed papers in?           A. Yes, sir.



(Testimony of Lester W. Hurley.)

Q. And when you had occasion to make up a new file, would you make one up?

A. That is right.

Q. From information you obtained from the correspondence you were dealing with?

A. That is correct.

Q. Did you have occasion to personally write any correspondence in that capacity?

A. No, sir.

Q. How long were you so employed?

A. I would say, to the best of my recollection, about six months or nine months.

Q. And you continued in the employ of the Missouri Pacific? A. Yes, sir.

Q. And in what capacity next? [41]

A. As call boy.

Q. And what were your duties as a call boy?

A. Calling the crews, the same position I had previously held.

Q. Did you receive an increase in salary with that change?

A. That was a reduction in force. They cut off some clerks and I was compelled to exercise my seniority back to that of call boy.

Q. How long did you continue as a call boy the second time?

A. Let me see. To about 1927, to my best recollection.

Q. Then there was another change in your employment, that is, the duties of your employment?

A. That is correct.

(Testimony of Lester W. Hurley.)

Q. And what did you then do?

A. Report clerk.

Q. Will you explain what your duties were?

A. To maintain and compile various mechanical department reports.

Q. You would compile these reports from what information?

A. Well, the information I received from various sources.

Q. That is, from various departments of the Missouri [42] Pacific Railroad System?

A. No. From one locality there in the shops.

Q. The shops which are located in Kansas City, Missouri?

A. Yes, sir; that is right.

Q. What departments were involved?

A. The mechanical departments.

Q. Well, all mechanical? I mean what various mechanical departments?

A. That is all. They have the roundhouse and the shops there.

Q. These reports were to whom?

A. Well, to the various offices on the railroad they were mailed to.

Q. And you prepared those reports. Did you prepare them in your own handwriting?

A. Well, as I recall, there was one shop report I made on the typewriter.

Q. And you made it directly on the typewriter or did you dictate the report and have it transcribed by a stenographer?

(Testimony of Lester W. Hurley.)

A. I made it on the typewriter myself.

Q. And others were made in your own handwriting?  
A. That is right; yes, sir.

Q. How long did you serve in that capacity?

A. To my best recollection, it was around the year 1931 or '2.

Q. And that was, somewhat roughly, three or four years [43] in that work?  
A. Yes, sir.

Q. So that from the period between 1927 and 1931 or '32, your employment was as you have just last described?  
A. That is correct.

Q. At that time where did you live?

A. 5716 Scarritt, Kansas City, Missouri.

Q. You lived there all during that period of time?  
A. Yes, sir.

Q. You were married?  
A. No, sir.

Q. You were living alone?

A. Lived with my father. My mother was dead.

Q. Up until 1931 or 1932?  
A. Yes, sir.

Q. Did you have a telephone there?

A. Yes, sir.

Q. During what period of time did you have a telephone?

A. Well, I can't recall as to that. It was in my father's name. It was not in my name.

Q. Did you have a telephone at that address all during the period from 1927, that is to say, until 1931 or 1932?  
A. I don't know as to that.

Q. You don't know. In your employment did you ever have occasion to examine or deal with or

(Testimony of Lester W. Hurley.)

file photostatic copies of instruments?

A. Not that I know of; no, sir.

Q. Not that you know of? [44]

A. No, sir.

Q. But you may have had?

A. Well, there wasn't any photostatic equipment there. There might have been blueprints, something like that, but not photostatic equipment.

Q. Can you say now that you did not at any time receive, file, deal with, or forward photostatic copies of documents?

A. Well, my memory is not that good that I can tell whether I filled a piece of paper there that was a photostat.

Q. Did you ever reside with you uncle, Mr. George Burton?

A. I did; yes, sir.

Q. What time?

A. It was in the years 1924 and '25, part of the year '25.

Q. And approximately how long did you live with him?

A. Approximately nine months.

Q. And you were employed at that time?

A. Yes, sir.

Q. Did you pay him anything for board and room?

A. Yes, sir.

Q. During the time you lived with him?

A. That is correct.

Q. How many children of your uncle resided with him [45] at that time?

A. Eight, I believe. Just a moment.

Q. And included there was Helen Burton?



(Testimony of Lester W. Hurley.)

A. May I correct that statement? There was a few of them married there. There were eight children, but at that time I don't recall right offhand how many were married.

Q. Helen Burton resided in the same home at the same time? A. Yes, sir; that is correct.

Q. And she is the same Helen Burton you have already referred to in your testimony?

A. That is right.

Q. I call your attention to Plaintiff's Exhibits 1 through 7, inclusive, which have been admitted in evidence and which you have previously examined. When did those original documents first come to your attention? When did you first see them?

A. Well, let's see. It was about two weeks previous to the preceding trial.

Q. And that trial was when?

A. In January 1944—'45.

Q. 1945? A. Yes, sir.

Q. Prior to that time, when you first saw these originals, had you ever seen what purported to be photostatic copies of those documents? [46]

A. I had.

Q. And when did you first see them?

A. That was shortly after March the 18th, 1944.

Q. And you examined those photostatic copies or what purported to be photostatic copies?

A. Yes, sir.

Q. And you then reached some conclusion as to

(Testimony of Lester W. Hurley.)

whether the purported signatures of Lester Hurley appearing thereon were your own?

A. I beg your pardon?

The Court: Please read the question, Mr. Reporter.

(Question read by the reporter.)

A. I reached a conclusion; yes, sir.

Q. (By Mr. Wynn): And what was that conclusion?

A. That they were not my signatures.

Q. Now, at that time and upon examining the photostatic copies, was that merely your opinion or your best belief, or had you reached a positive, definite conclusion that they were not your signatures?

A. Yes, sir; they were not my signatures, positive.

Q. You were positive of that? A. Yes, sir.

Q. There was no question in your mind whatsoever? A. That is right.

Q. Upon examining the photostatic copies? [47]

A. That is right.

Q. And then subsequently you examined the originals? A. That is correct.

Q. Now, did you change your opinion in any way when you examined the originals? A. No, sir.

Q. You were still positive; no question in your mind whatever that they were not your signatures?

A. That is right.

Q. At any time from the date when you first

(Testimony of Lester W. Hurley.)

testified that you learned of the existence of some 575 shares of stock in the Edison Company in which you had some interest, did you ever at any time entertain any doubt whatever as to whether or not those signatures were yours?

A. I didn't quite get the connection of the question there. Would you please read it?

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

The Witness: I don't get the connection of the question, your Honor.

The Court: The question is: Did you from the time you learned that those certificates had been in your name, had been issued in your name, did you at any time from that time on ever entertain a doubt as to whether or not you had signed the assignments? [48]

The Witness: "Any doubt"—no, sir.

The Court: Is that your question, Mr. Wynn?

Mr. Wynn: Yes, sir.

A. No, sir; I didn't entertain any doubt.

The Court: Did you ever at any time entertain any doubt about it?

The Witness: No, sir.

Q. (By Mr. Wynn): You recall testifying in the case of Burton versus Hurley in the District Court of Kansas, do you not? A. Yes, sir.

Q. I show you transcript of your testimony in that action, direct your attention to page 3 thereof, the last question appearing thereon, and your

(Testimony of Lester W. Hurley.)

answer; and on page 4, the first question and your answer. Will you please read them to yourself?

A. Yes, sir; I have read it.

Q. I will now read you the questions and answers to which I directed your attention, as follows:

“Q. Now, Mr. Hurley, I hand you Plaintiff’s Exhibits 1 to 7 which show the issuance by the Southern California Edison Company on November 20, 1928, of the seven certificates representing 575 shares of stock, and ask you to look at the assignment which purports to have been made of this stock [49] and attached on a separate sheet on the back of the certificates, and carefully note the signature ‘Lester Hurley’ that appears thereon and tell the court as to whether or not, to your knowledge, that is your signature.

“A. No, sir.”

Did you so testify?

A. That is right.

Q. The following question:

“To the best of your knowledge and belief, that signature appearing upon each of these seven instruments is not your signature?

“A. No, sir.”

Did you so testify?

A. That is correct.

Q. Now, you testified in court this morning on direct examination positively that these questioned signatures on the exhibits in question were not your signatures?

A. That is right.



(Testimony of Lester W. Hurley.)

Q. Is there any reason why at the present time you should be any more positive than you were at the trial of the preceding action in January, 1945?

A. No, sir.

Q. None at all? A. No, sir. [50]

Q. Then, if, when you testified in January of 1945, it was only "to the best of your knowledge and belief," that is your present view?

A. That is right.

Q. To the best of your knowledge and belief?

A. That is right.

The Court: Did you answer?

The Witness: Yes, sir, your Honor.

Q. (By Mr. Wynn): Do you want to be heard by this court as to say positively that those cannot be your signatures? Is there any question? Is there any question in your mind?

Mr. McCormick: Just a minute, if your Honor please. I object to that for the reason that the transcript to which he is referring is selected—a question which does not give a fair statement of the witness' testimony, because he did testify as positively to other questions presented as he did at the present time. I think it is improper to select out those statements.

The Court: Objection overruled. Counsel may inquire.

Mr. Gunter: Only, I think, another question is pending.

The Court: I suggest you rephrase it. Put another question.

(Testimony of Lester W. Hurley.)

Mr. Wynn: I think there is another question pending, if the court please, after Mr. McCormick's objection. May that be read?

The Court: There are two questions, I believe, pending. [51] You can read the last two questions, Mr. Reporter.

(Record read by the reporter.)

The Court: I would suggest you rephrase those last two into one question. There are two questions in effect.

Mr. Wynn: I will withdraw the questions, at the court's suggestion.

Q. At the present time is there any question whatever in your mind as to whether or not the signatures "Lester Hurley" appearing on Plaintiff's Exhibits 1 through 7 are or are not your valid signatures?

A. They are not my valid signatures.

Mr. Wynn: I object to the answer as not responsive.

The Court: The question is: Is there any doubt in your mind about it?

The Witness: No, your Honor.

The Court: That is your question, is it not?

Mr. Wynn: That is correct.

The Witness: I beg your pardon. I didn't understand it.

Q. (By Mr. Wynn): Was there any doubt in your mind in January of 1945, at the trial of the prior action? A. No, sir.

(Testimony of Lester W. Hurley.)

Q. It is a fact, is it not, that in the trial of the prior action, or rather in the pleadings therein—by that reference I mean the case of Burton versus Hurley in the District Court of Kansas—that in your pleadings you took [52] the position that either you had not signed those documents or, if you had signed them, it was because of a conspiracy between your grandmother and your uncle?

Mr. Gunter: Objected to as calling for a legal opinion of the witness. .

The Court: The documents would be the best evidence.

Mr. Wynn: Correct. Will counsel stipulate that in the prior action the pleadings were filed on behalf of this party, Lester W. Hurley, in which it was alleged on his behalf that he did not execute said instruments, Plaintiff's Exhibits 1 through 7, inclusive, and that if he did execute them, it was due to conspiracy to defraud him on the part of his grandmother and his uncle?

Mr. McCormick: I will state, if the court please, that there were two grounds upon which the petition was drawn in that action: One, in which forgery was definitely and specifically charged; and the additional ground, upon which it was charged that if, in any event, the signatures were proven or established to the satisfaction of the court that they were the genuine signatures of Lester Hurley, that they were signed without a realization and understanding of the nature of the instruments being



(Testimony of Lester W. Hurley.)

so signed, and were brought about by reason of a misrepresentation and deceit practiced upon him at the time.

The Court: There were two issues tendered, one that [53] denied that he executed the assignment, and the other, in the alternative, that if the court found he did, that he was a minor and disaffirmed them.

Mr. McCormick: And that no consideration was paid; that is true, your Honor; and it was upon both, and the case was tried upon both issues.

The Court: Do you accept that statement?

Mr. Wynn: I will accept that, yes. And I might ask, further, if counsel has copies of the answer or cross-complaint filed on behalf of their client in that action, that I may be able to question him with reference thereto?

Mr. McCormick: So far as the pleadings, I do have them and they will be made available to counsel if he desires them, although I wish it to be known that the witness did not pass upon the nature of the pleadings or actions, which I think the court will take judicial notice of that fact, but I think it is only fair to the witness.

The Court: Is the document verified by the witness?

Mr. McCormick: No, sir. It is a petition filed on his behalf by counsel employed by him at the time.

The Court: You have offered here the findings and judgment in the action. If counsel wishes to



(Testimony of Lester W. Hurley.)

offer the pleadings, I think the offer would be very appropriate to accompany the findings and the judgment.

Mr. McCormick: I will be very glad to produce them. [54]

The Court: In the event they are received into evidence, the pleadings might be used now for the purpose of examination and later offered, if counsel is so advised.

Mr. Wynn: Yes, I will proceed now, with the court's permission, and when convenient take up the pleadings.

The Court: Very well.

Q. (By Mr. Wynn): Mr. Hurley, do you have at the present time a signature which you consider your customary signature? A. Yes, sir.

Q. How do you customarily sign your name when you are signing your signature?

A. "L. W. Hurley."

Q. "L. W. Hurley"? A. That is right.

Q. Have you on occasion used the signature "Lester W. Hurley"? A. Yes, sir.

Q. Do you use that on occasion at the present time? A. Not generally speaking, no.

Q. In the years 1928 and 1929 did you have a customary signature?

A. As far as I know, I have not changed it any.

Q. So the best of your recollection is that at that time your customary signature was "L. W. Hurley"?

(Testimony of Lester W. Hurley.)

A. That is right. May I add, your Honor, that in [55] endorsing checks you usually endorse them the way the signature or the check is made out.

Q. Oh, yes. If the check were made out to you as "Lester Hurley," you would customarily endorse it as "Lester Hurley"? A. That is right.

Q. And if it were made to "Lester W. Hurley," you would customarily so endorse it?

A. That is right.

Q. But at all times when you were called upon to affix your signature to a document you would customarily sign "L. W. Hurley"?

A. Well, I don't know as I would. I might sign it any way.

Q. Well, yes, you might have signed it any way, but you testify that customarily you signed "L. W. Hurley"?

A. That was my general way of signing my name. I have signed it various ways, though, in my lifetime.

Q. That is right. If you were called upon to sign a document, though, your first reaction would be to sign it "L. W. Hurley" unless there were some reason for you to sign it another way; isn't that correct?

A. Well, as I say, I signed it various ways.

The Court: But that is not the question, Mr. Hurley. The question is: suppose you go into a hotel to register, [56] how would you register?

The Witness: I would register "L. W. Hurley."

(Testimony of Lester W. Hurley.)

The Court: If you signed a book for a guest, how would you register?

The Witness: "L. W. Hurley."

The Court: In other words, unless you were called upon to make it "Lester," you just signed it "L. W."?

The Witness: That is correct; yes, sir.

Q. (By Mr. Wynn): Do you know of the location of the Union Station in Kansas City, Kansas?

A. There is no Union Station in Kansas City, Kansas.

Q. Kansas City, Missouri? I misspoke myself.

A. The South-Central location of the downtown section.

Q. In the years 1928 and 1929 do you know where your uncle George Burton resided?

A. 1046 Ann Avenue, Kansas City, Kansas.

Q. How far away was that from the Union Station?

A. Oh, I should judge approximately eight or ten miles.

Q. You resided at that time, you testified, at an address on Scarritt Avenue?

A. That is correct.

Q. How far away was that from the Union Station?

A. Approximately seven miles, I should say.

Q. In an opposite direction?

A. Yes, sir. [57]

Q. So that the distance from your residence to

(Testimony of Lester W. Hurley.)

that of your uncle's at that time was approximately 15 miles?

A. Well, not quite that far. It would be an out-of-the-way way to go to the Union Station to go the other way.

Q. Are you familiar with the location of the Brotherhood State Bank? A. I am; yes, sir.

Q. It was in the same location in 1928 that it is now?

A. Well, I know where it is now located; yes, sir.

Q. Do you know where the Brotherhood State Bank was located in 1928? A. No, I don't.

Q. Do you know where the funeral of your grandfather took place? A. Yes, sir.

Q. Where was that?

A. Gibson & Sons over on Kansas side at 7th and State.

Q. Where was that in relation to the residence of your uncle at that time?

A. He lived in the 1000 block on Ann Avenue. About eight blocks, I should guess.

Q. From the undertaking parlor?

A. Yes, sir.

Q. Did you have an automobile at that time?

A. No, sir. [58]

Q. But you attended the funeral of your grandfather or, rather your step-grandfather?

A. That is correct.

Q. And that, you testified, was on January the 19th of 1929? A. Yes, sir; that is right.



(Testimony of Lester W. Hurley.)

Q. As a matter of fact, you acted as a pall-bearer?      A. That is correct.

Q. What time of the day did that funeral take place?      A. In the afternoon.

Q. About what time?

A. Well, I don't recall the time. It was in the afternoon as close as I can get to it.

Q. But you are positive that that was on January 19th of 1929?      A. Yes, sir.

Q. And do you know what day of the week that fell on?      A. It fell on Saturday.

Q. Now, do you recall the remains of your grandfather or your step-grandfather being brought from California to Kansas City?      A. No, sir.

Q. You do not know of your own knowledge when they arrived?      A. No, sir. [59]

Q. How were you notified that the funeral was to take place on Saturday, January 19th?

A. I don't recall.

Q. Do you recall how you traveled in proceeding from your home to the place of the funeral?

A. No, sir.

Q. Well, you did not have an automobile?

A. No, sir.

Q. Did you ride a bicycle?

A. I don't think I rode a bicycle; no sir.

Q. Did you ride a streetcar?

A. I couldn't say as to that, whether I rode a streetcar or not.

Q. Did you walk?

(Testimony of Lester W. Hurley.)

A. I don't believe I walked over there; no, sir.  
Mr. Wynn: I did not hear the answer.

A. I don't believe I walked over there; no sir.  
Mr. McCormick: Speak up a little louder, if you will, please, Mr. Hurley. It will make it easier for everyone.

Q. (By Mr. Wynn): Now do you have any recollection at all as to how you went to the funeral?

A. No, I don't; no, sir.

Q. Do you know what time you arrived at the undertaking establishment? A. No, sir. [60]

Q. Do you have any recollection at all whether you waited before the funeral commenced?

A. No, sir.

Q. Do you have any recollection as to whether you first proceeded to the home of your uncle?

A. No, sir.

Q. Do you have any recollection as to whether you proceeded to the funeral in the company of your grandmother, Mrs. Price? A. No, sir.

Q. No recollection whatever? A. No, sir.

Q. The only thing you recall is that in some manner you proceeded from your home to the undertaking establishment; you don't think you walked; you did not have an automobile; but in some manner you got there. You do not know whether you went first to your uncle's home and met your grandmother—I will withdraw that question. It is becoming compound, if your Honor please.

Now, directing your attention to that date, that

(Testimony of Lester W. Hurley.)

is, Saturday, January 19th, do you recall whether or not you worked on that day?

A. I did not work in the afternoon; no, sir.

Q. But you worked Saturday morning?

A. Yes, sir. [61]

Q. Where was your place of employment with relation to your home or residence?

A. I would say a distance of approximately a mile and a half.

Q. Do you recall how you traveled from your place of employment to your home on that day?

A. I most generally walked back and forth to work.

The Court: The question is: On that day.

The Witness: Well, I don't remember. No, sir, your Honor.

Q. (By Mr. Wynn): Do you recall whether after leaving your place of employment you went home and changed your clothes before going to the funeral?

A. Well, it would be customary, I imagine; yes, sir.

The Court: The questions is: Do you remember?

The Witness: No, I don't remember. No, sir.

Q. (By Mr. Wynn): Do you remember the date preceding the funeral what your movements were on that day?      A. No, sir.

Q. Do you recall now whether or not you worked on the preceding day, which was Friday, January 18th?



(Testimony of Lester W. Hurley.)

A. Well, the only thing is that, since this case was started I have had occasion to look at the time records and they show I worked that day. That is the only thing I can give you.

Q. You have no independent recollection, have you? [62]

A. No, I haven't; no, sir.

Q. Where was the interment of your grandfather's remains?

A. Mount Washington Cemetery, Kansas City.

Q. And did you proceed to that point?

A. Yes, sir.

Q. In whose company, if anyone's?

A. Well, we went with the pallbearers. I don't recall right now offhand who they all were, but we were all together.

Q. Where was your grandmother staying during this period, that is, over the time of the funeral?

A. During the time of the funeral I don't know.

Q. Isn't it a fact that she was staying with her son, George Burton?

A. I don't know as to that; no, sir.

Q. Do you recall whether you saw her any time from the date of her return from California with the remains to the time of the funeral?

A. I can't recall it now; no, sir.

Q. No recollection whatever?

A. No, sir.

Q. Do you recall whether you visited her after the funeral on January 19th?

A. I have no independent recollection of it; no, sir.



(Testimony of Lester W. Hurley.)

Q. Do you recall the next time you visited [63] her?  
A. No, I don't.

Q. Do you now recall whether you saw her at any time between her return from California and the date of the funeral?  
A. No, sir.

Q. Now, prior to the date of the funeral and her return from California, that is, your grandmother, Mrs. Price, when had you last seen her?

A. In 1922.

Q. So that from 1922 until 1929 you had not seen her?

A. To the best of my recollection now, I had not; no, sir.

Q. Did you maintain correspondence with her?

A. I corresponded occasionally with her; yes, sir.

Q. By "occasionally" what do you mean, how many times a year?

A. Possibly two or three.

Q. Now, you visited your grandmother and her husband, Mr. Price, here in Los Angeles in 1921, 1922, and 1923, is that correct?

A. 1920, 1921, and 1922.

Q. I am corrected. How long did you stay on each visit?

A. I would say approximately a month.

Q. Where did you first meet Mr. Price?

A. In Excelsior Springs, Missouri.

Q. And during what year? [64]

A. Well, I was rather small when we first went up there, my mother and I.

(Testimony of Lester W. Hurley.)

Q. You went then on one occasion or more?

A. On several.

Q. How long would you stay on these visits?

A. Well, I don't recall now how long we stayed.

Q. Well, was it a matter of a day or two, or was it a matter of a week or a month?

A. I can't recall how long we stayed.

Q. Do you now recall that you did not stay as long as a month?

A. I can't recall how long we stayed.

Q. Do you know what time of the year you would make these visits?      A. No, sir.

Q. Do you know whether you would go in summer vacation from school or during the school year?

A. No, sir.

Q. You have no recollection of that?

A. No, sir.

Q. You testified that Mr. Price and Mrs. Price came to California in 1917?

A. Somewhere along thereabouts; yes, sir.

Q. So from 1917 until your visit in 1920 you had not seen Mr. Price? [65]

A. That is correct.

Q. Had you corresponded with him during that period?

A. Just a moment. I recall one time he came back to Kansas City and I saw him then in the intervening time.

Q. When was that?

A. Between the period you mentioned there, 1917 to 1919 or to 1920.

(Testimony of Lester W. Hurley.)

Mr. Wynn: I think, if the court please, I had a question pending that has not been answered.

The Court: Would you read it, Mr. Reporter?

(Pending question read by the reporter as follows: "Q. Had you corresponded with him during that period?")

A. No, sir.

Q. Had he ever corresponded with you?

A. No, sir.

Q. So Mr. Price never told you that he was going to give you any stock in the Edison Company, did he? A. No, sir.

Q. On your visits in California in 1920, 1921, 1922 you were accompanied by your mother?

A. That is right.

Q. And where did you stay during your visit here? A. At their home.

Q. Approximately how long did you stay? [66]

A. Well, I don't know as to that. I would say approximately a month each time.

Q. When would those visits occur?

A. In the summer.

Q. On the occasion of those visits did Mr. Price ever tell you that he was going to see that you got some stock in the Edison Company?

A. No, sir.

Q. He never said a word to you about that?

A. No, sir.

Q. During the fall, that is, the last three months

(Testimony of Lester W. Hurley.)

of 1928 and the early months of 1929, just where was your place of employment?

A. Missouri Pacific Railroad, East Bottoms Shops, Kansas City.

Q. Did your duties require you to serve at any other locations? A. Not at that time, no, sir.

Q. Now, did you work different shifts there?

A. No, sir.

Q. What shift did you work?

A. From 8:00 to 4:30, 8:00 a.m. to 4:30 p.m.

Q. How many days a week?

A. Six days a week.

Q. Which days did you have off? [67]

A. I had a half day off on Saturday and Sunday.

Q. All day Sunday? A. Yes, sir.

Q. So you worked five and a half days?

A. That is right.

Q. Saturday afternoon and Sunday off?

A. That is right.

Q. And your place of employment was, roughly, seven or eight miles from the Union Station in Kansas City, Missouri?

A. Approximately, yes, sir.

Q. Where was your uncle employed during that period of time I have just mentioned?

A. Well, it is my best belief he was working in the information bureau there at the Union Station.

Q. And you were working seven or eight miles away? A. Yes, sir; that is right.

Q. Now, you last lived with your uncle when—in 1924, was it?



(Testimony of Lester W. Hurley.)

A. In the early part of 1925.

Q. 1925. After that date and, say, the first of 1929, did you correspond with him?

A. No, sir.

Q. Between 1929 and March 18th of 1944 did you correspond with him?

A. I had correspondence with him in that period; yes, sir. [68]

Q. And now, what was that, a social correspondence?

A. No, sir. It was when I was working in St. Louis I received, I think, a couple of letters from him.

Q. Do you recall now what the subject of the letters was?

A. Well, it was after my grandmother's death. It was in connection with the transfer of the stock.

Q. So that from the time you resided with him up until your grandmother's death or shortly after that you had no correspondence with him?

A. No, sir; that is right.

Q. And he had written no letters to you?

A. No, sir; none that I know of.

The Court: Were you both employed by the same railroad?

The Witness: No, sir. He worked for the Kansas Terminal Railway and I worked for the Missouri Pacific Railroad.

Q. (By Mr. Wynn): Nevertheless, you are familiar with his handwriting?

A. Fairly well so; yes, sir.

(Testimony of Lester W. Hurley.)

Q. But you do not base that familiarity on any correspondence you had with him over a period of 19 years?      A. No, sir.

Q. On what do you base that familiarity?

A. Well, comparing the signatures there on that document [69] that is purported to be his signature, that is what I judge to be his signature.

Q. Now, just what document are you referring to?

A. Well, the ones that were presented to me.

Q. You have before you Plaintiff's 1 through 7 which purport to bear signatures of George Burton?

A. That is right.

Q. What did you compare that signature to when you came to the conclusion that that was the actual signature of your uncle?

A. All I was doing was testifying that he has admitted that it was his signature, and I have stated that that was his signature.

Q. But you did not compare that with any handwriting you had?      A. No, sir.

Q. Of George E. Burton?      A. No, sir.

Q. Now, the same is true as to the second signature of your grandmother, "Elizabeth J. Price," is it not?

A. Well, I am fairly well acquainted with her signature.

Q. But you testified that your correspondence with her was very casual over this period of time, isn't that correct?

A. That is right; yes, sir.

(Testimony of Lester W. Hurley.)

Q. And when you first examined the photostatic copies [70] of the documents you now have before you and came to the conclusion that your signature or that the signature "Lester Hurley" appearing thereon was not your own did you at that time come to any conclusion as to the validity or authenticity of the signatures of George Burton or Elizabeth Price?

The Witness: I didn't quite get that, sir.

The Court: I suggest you rephrase it.

Mr. Wynn: I withdraw the question at the court's suggestion.

Q. At the time you first examined the photostatic copies of the documents you now have before you, Plaintiff's 1 through 7, you did not have any signatures of Mrs. Elizabeth J. Price which you knew to be genuine? A. Yes, sir; I did.

Q. Now, where did you obtain such signatures?

A. Well, I had a letter at home that I had that had her handwriting on it, and I believe I had Christmas cards, something like that.

Q. Yes. As to George Burton did you have any data available before you?

A. Well, he had written me in St. Louis after my grandmother died.

Q. Yes, in 1943 or 1944?

A. That is right.

Q. And the documents before you now purport to have been [71] executed in 1929, some 15 years before? A. Yes, sir.

(Testimony of Lester W. Hurley.)

The Court: Those were the first seven exhibits, Exhibits 1 to 7?

Mr. Wynn: Exhibits 1 to 7. I appreciate the court's suggestion.

The Witness: Well, there is no date on here.

Mr. McCormick: Just a moment. I am sure that counsel is not desirous of misleading the witness, but the time when the examination of these documents or photostatic copies, as the witness has testified to, occurred in 1944. And the letters——

The Court: The question now is as to when those signatures were made, is the question as I understand it.

Mr. McCormick: I did not so understand the question.

Mr. Wynn: Yes, that is it. I mean you will stipulate, will you not, that these documents were executed, purported to be executed sometime in February of 1929

Mr. McCormick: That is correct. But I understood you were asking Mr. Hurley as to whether or not he had a letter or any correspondence with Mr. Burton available in 1944 which would be a basis of comparison.

Mr. Wynn: He testified that he had received a letter from his uncle shortly after the mother's death, which was in December of 1943, and that he had that letter available to [72] conclude as to the validity of the signature of George Burton.

Mr. McCormick: That is right.



(Testimony of Lester W. Hurley.)

The Court: The Pre-Trial Stipulation, gentlemen, shows that the dividend orders were at least submitted to the defendant in November of 1928 and the assignment of the certificate was submitted to the defendant in January, 1929; so I think it is clear the writing on them must have been made prior to that time.

Q. (By Mr. Wynn): I hand you now Plaintiff's Exhibit No. 10 which has been previously called to your attention. As I understand your testimony, the handwriting on this document appearing in the upper half thereof, consisting of the name of "Mrs. Elizabeth J. Price" on one line and thereunder, on two lines "Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley" was, in your opinion, the handwriting of your grandmother?

A. The two "Elizabeth Prices" there, in my opinion, was my grandmother's.

Q. Now, do you have any opinion as to whose handwriting the remaining writing on those three lines referred to is?

A. No, sir.

Q. No opinion?

A. No, sir.

Q. I show you Plaintiff's Exhibit 13, Dividend Order 12743, and directing your attention to the same three lines [73] referred to previously, as I understand your testimony, that handwriting is the handwriting of your grandmother?

A. Yes, sir. The two "Elizabeths," that is, the two "Elizabeth Prices" on that document.

Q. But not the remaining portion of that?

A. No, sir; this part in here.

(Testimony of Lester W. Hurley.)

Q. Yes. So the record may be clear, then, as to Plaintiff's Exhibit 13, in your opinion the words "and George E. Burton and Lester Hurley" is not in the handwriting of your grandmother?

A. That is right.

Q. And on Plaintiff's 10?

The Court: Your answer?

The Witness: I said that was correct, yes, your Honor.

Q. (By Mr. Wynn): And on Plaintiff's 10, your testimony is that the words "and George E. Burton and Lester Hurley" is not in the handwriting of your grandmother?

A. That is correct; yes, sir.

Q. And you are basing that opinion on the familiarity you had with the handwriting of your grandmother by correspondence over the years from 1917 or '18 until the day of her death?

A. That is right; yes, sir.

Q. How much of that correspondence did you have in your possession at the date [74] of her death?

A. Well, one letter that I know of.

Q. And that was written when? A. 1941.

Q. Do you have that letter in your possession now?

A. I don't have it in my possession; no, sir.

Q. In the possession of your counsel?

A. I think so; yes, sir.

Q. You testified in your direct examination that your grandmother at one time told you that upon

(Testimony of Lester W. Hurley.)

her death you might acquire some stock in the Edison Company, is that correct?

A. I might obtain—she said she had some interest in the company that I might benefit by.

Q. Where did that conversation take place?

A. As I recall, it was over in Kansas City, Kansas, at her home at 428 North 18th Street.

Q. At whose home?

A. At her home, 428 North 18th Street.

Q. And approximately when was that conversation?

A. Well, I couldn't say when it was.

Q. Well, was it a month or two before her death or——

A. No. She was in the hospital at the time she died.

Q. All right.

A. It was while she lived at 428 North 18th Street.

Q. Well, when did she live at 428 North 18th?

A. I would say for a period from the time she went to [75] the hospital, which was two years prior to her death. About, I would say, six or seven years she lived at that address.

Q. Say she died in 1943, it was from 1941 six or seven years before that?

A. That is right.

Q. Can you fix it in that six or seven year period any more accurately?

A. No, I can't.

Q. In other words, you do not know whether it was in 1941 or 1934?

A. No, sir.

(Testimony of Lester W. Hurley.)

Q. Any time in that period? A. No, sir.

Q. Was anyone present during that conversation? A. Not that I recall; no, sir.

Q. What was the occasion of your visit with her at that time?

A. I visited her frequently when she lived there.

Q. So this was just a casual visit?

A. I dropped in; yes, sir.

Q. But nobody went with you?

A. No, sir.

Q. No one was present?

A. No, sir, that I recall.

Q. The occasion that you are now relating is the [76] first occasion that you can recall when she told you about any stock in the Edison Company?

A. She said she had some interest in stock that I might benefit by.

Mr. Wynn: I object to the answer as not responsive to the question, if the court please.

Mr. Gunter: He told what she said.

The Court: Do you wish it stricken?

Mr. Wynn: Yes, if the court please, for the purposes of the objection.

The Court: The answer may go out. Please read the question, Mr. Reporter.

(Question read by the reporter.)

A. Well, I can't answer one way or the other, your Honor. If I say "no" it would be misleading, and if I say "yes" it would be misleading.

The Court: Do you mean it assumes a fact not in evidence, that she told you about stock?



(Testimony of Lester W. Hurley.)

The Witness: Yes, sir; that is correct.

The Court: Well, you may answer it and explain your answer, the first occasion she mentioned to you that you might get something.

The Witness: That I might benefit from some interest she had.

The Court: Is that your question? [77]

Mr. Wynn: Yes. And the answer is, that was the first occasion?

A. She said that she had some interest in some stock that I might benefit from.

Q. She had not said anything to you before that time? A. No, sir.

Q. And that time may have been any time between 1934 and 1941? A. Yes, sir.

Q. And that is the only occasion?

A. Yes, sir.

The Court: Did she mention what kind of stock?

The Witness: Not that I recall, your Honor. She said she had some interest that I might benefit from it.

The Court: Did she mention the company?

The Witness: No, not that I recall, your Honor.

The Court: We might take the afternoon recess at this time of five minutes.

(Short recess.)

Mr. Wynn: Shall I proceed?

The Court: Yes.

Q. (By Mr. Wynn): Mr. Hurley, during the lifetime of your grandmother on occasion you signed

(Testimony of Lester W. Hurley.)

certain proxies covering stock in the Edison Company, did you not?

A. I signed by proxy; yes, sir. [78]

Q. On how many occasions did you sign proxies?

A. I might have signed one on one occasion, I believe.

Q. Do you recall when that occasion was?

A. Approximately in 1941, I believe.

Q. When you answer you possibly might have signed one, you mean you have no recollection of signing one?

A. No, sir; no distinct recollection.

Q. Do you have any recollection of having signed a document at her request?

A. No, sir. No, sir.

Q. But you do not now recall that you never signed a document at her request, do you?

A. I never signed a document at her request; no, sir, only the proxy, and possibly might have signed a proxy.

Q. Now, you are not clear on that at the present time?

A. I had a request to sign a proxy from her.

Q. How was that request made?

A. In writing.

Q. From your grandmother? A. Yes, sir.

Q. In the year 1941? A. Yes, sir.

Q. Did you preserve that request?

A. Yes, sir.

Q. Do you still have it? [79]

(Testimony of Lester W. Hurley.)

A. Yes, sir. My attorneys have it, I believe.

Q. In court? A. Yes, sir.

Mr. Wynn: Mr. McCormick, do you have that?

Mr. McCormick: Yes. I will find it for you.

Mr. Wynn: I will hand to the clerk and ask to have marked for identification a letter dated February 17, 1941, signed "Grandmother Price," together with an envelope which accompanies the letter, the postmark having been torn off the envelope.

The Clerk: That will be Defendant's A for identification.

Q. (By Mr. Wynn): Now, is it your testimony that on no other occasion did you receive a proxy from your grandmother with the request that you sign same? A. No, sir.

Q. You are now positive of that?

A. Yes, sir.

Q. Never on any other occasion?

A. No, sir.

Q. Do you recall whether or not you signed the proxy which was delivered to you by your grandmother?

A. I can't say to that; no, sir.

Q. I hand you Defendant's Exhibit A for identification, purporting to be a letter dated February 17, 1941, signed "Grandmother Price" and an envelope addressed to "Mr. Lester Hurley, 554 Stonewall Court, Kansas City, Mo." and ask you if [80] you received that letter? A. Yes, sir.

(Testimony of Lester W. Hurley.)

Q. Do you recognize the handwriting thereon?

A. Yes, sir.

Q. Is it the handwriting of your grandmother?

A. It is; yes, sir.

Mr. Wynn: We offer this into evidence.

Mr. McCormick: No objection.

The Court: Defendant's Exhibit A for identification is received into evidence.



February 17/41

Dear Grandson I have  
the Proxy for you to  
sign can you come over  
and sign as I want to return  
it to Edison as soon as  
possible

Grandmother  
Price

Sept 10 - 17  
a paper  
121 x 100

Ext



Mr. Leslie H. H. H.  
55 1/2 St. ...  
Kansas ...

no



(Testimony of Lester W. Hurley.)

Q. (By Mr. Wynn): I will show you a transcript of your testimony. As I have advised your counsel, I am calling your attention to page 17 of a transcript of your testimony in the case of Burton vs. Hurley in the District Court for Kansas, and ask that you read the portion thereof beginning with the question: "Did you have any request from her to sign a proxy?" on page 11 through your answer on the same page: "I did, yes, sir." Will you please read that?

A. Yes, sir.

Q. Now, the portion I have shown to the witness reads:

"Q. Did you ever have any request from her to sign a proxy? A. Yes, sir.

"The Court: Who would make that request, she in person or someone else? [81]

"A. She would, yes, sir.

"Q. (By Mr. McCormick): Any of those instruments of that character that you signed did you rely upon your grandmother as to the nature of the instrument that was presented to you? A. I did, yes, sir."

Did you so testify?

A. That is correct.

Q. Now, when your counsel referred to instruments at that time, you realized that he was referring to more than one instrument, did you not?

A. I understand so; yes, sir.

(Testimony of Lester W. Hurley.)

Q. By your answer did you mean to imply that you signed more than one instrument?

A. No, sir.

Q. How do you explain that testimony?

A. Well, I don't have any recollection of it, only the correspondence that I have of my grandmother requesting that I sign the proxy.

Q. So that you may very well have signed more than one instrument?

A. I don't think so; no, sir.

Q. But you have just testified that you have no recollection of it?

A. No, no direct recollection of it; no, sir. [82]

Q. So you do not recall whether you did or did not, at the present time?

A. I don't recall that I signed that one, either, no, sir.

Q. At the present time? A. No, sir.

Q. Did you have any more vivid recollection at the time of the trial of the case in *Burton vs. Hurley* in Kansas? A. No, sir.

Mr. Wynn: May I interrupt and ask the court if the court has any objection to me reading these direct to the witness, rather than showing it to him each time? It will save time.

The Court: Has he seen the document?

Mr. Wynn: This is the transcript. I am going to ask him if he so testified. Do you have any objection?

Mr. McCormick: I have no objection to that, your Honor, if it is satisfactory to the court.



(Testimony of Lester W. Hurley.)

Mr. Wynn: It will save time.

The Court: Very well.

Mr. Wynn: I am now reading from page 30 of the transcript of your testimony in the case of Burton vs. Hurley in the District Court of Kansas.

“Q. Do you have any recollection of ever having signed any dividend order or anything similar to that instrument having to do with stock of the Southern [83] California Edison Company?

“A. The only thing is a proxy that I have already testified to.”

Did you so testify?

A. Yes, sir.

Q. Then,

“Q. When was the first time that you signed a proxy? A. I don't recall that, either.”

Did you so testify?

A. Yes, sir.

“Q. Do you recall about when it was?

“A. No, sir. No, I don't.”

Did you so testify?

A. Yes, sir.

“Q. Was it before or after your grandfather's death?

“A. I recall that I signed some of them after my grandfather's death. I would say seven or eight years ago.”

Did you so testify?

A. Yes, sir.

(Testimony of Lester W. Hurley.)

Q. Now, do you want to modify your testimony in the cause now pending before this court in that respect?

A. Well, the only thing is that I didn't have that [84] before me there as to the date. I didn't know the actual time it was that she made a request that I sign a proxy.

Q. Yet you did testify in this preceding action that you signed some of them before your grandfather's death, some seven or eight years before?

A. As I recall it, it was in that letter there which was after my grandfather's death; yes, sir.

Q. And you are now testifying that you do not recall that you ever signed any of them?

A. Well, it was the request that I had made upon me to sign it. I don't recall that I did sign it.

Q. Did you know seven or eight years prior to January of 1945 what a proxy was?

A. No, sir.

Q. But you did testify that seven or eight years before that date you did sign a proxy?

A. Well, it was requested.

Q. Now you do not know whether it was a proxy that you signed or not, do you?

A. Well, the request I had was for a proxy.

Q. The request that you are referring to was 1941?

A. Yes, sir; that is right.

Q. But your testimony in the preceding case was that seven or eight years before 1941 you signed proxies?

(Testimony of Lester W. Hurley.)

A. As I stated, I didn't have the letter before me and [85] I was a little vague on the date as to when the request was made.

Q. You received that letter prior to giving your testimony in the case of Burton vs. Hurley, did you not?      A. That is right.

Q. Where was the letter during the trial of the case of Burton vs. Hurley?

A. It was introduced in the trial, I believe. Wasn't it, Mr. McCormick?

Mr. McCormick: Yes, it was introduced.

Q. (By Mr. Wynn): So it was in evidence in that case?

A. I didn't have it before me. I was not concerned exactly on what date the letter was dated.

Q. So when you gave your testimony here that seven or eight years before, you had signed some of them—referring to proxies—you did not know whether you did or not; is that your testimony?

A. I say it was around 1941, now, that I made the statement that I had a request to sign the proxy.

Q. Yet the matter was just as vivid in your recollection during 1945, during the time of that trial, as it is now?

A. Well, as I say, I didn't have the letter before me then.

Q. Then, Mr. Hurley, do you want to say that you were [86] mistaken when you testified in the case of Burton versus Hurley that you signed the proxies seven or eight years before that date?

A. I want to state that I had the request of

(Testimony of Lester W. Hurley.)

1941, the one I had in my mind. That is the one I was going on.

Q. And you could not recall at that time, in 1945, whether this occurrence was in 1941 or clear back in 1938?

A. As I stated, I didn't have the letter before me and I was vague as to the date.

Q. Do you recall how you affixed your signature to any proxy that you signed?

A. I say, I don't recall that I signed one. I had a request to sign one.

Q. Do you recall whether the instrument that came to you in this letter of February 17, 1941, referred to any stock?

Mr. McCormick: Just a moment. I object to that, as the instrument speaks for itself and it does not indicate that there was any instrument came to him in connection with that.

The Court: You are referring to Defendant's Exhibit A?

Mr. Wynn: What did I say?

Mr. McCormick: Well, I understood you to say as to whether or not the instrument referred to any stock.

Mr. Wynn: Yes. The objection may be sustained. I will rephrase my question.

Q. Do you recall having gone to your grandmother's [87] house to sign any instrument after receiving this letter of February 17, 1941?

A. No, sir.

Q. Where did she live at the time?



(Testimony of Lester W. Hurley.)

A. I believe her address is on the envelope, 428 North 18th, if I am not mistaken.

Q. Yet didn't you testify a few moments ago that you visited that address and talked to her there about an interest in stock in the Edison Company?

A. She said she had interest in some kind of stock.

Q. And she mentioned the Edison Company, did she not?

A. Not that I recall; no, sir.

Q. You mean you do not recall that now?

A. I do not recall it; no, sir.

Q. When you had this conversation with her concerning her interest in stock which might sometime benefit you did she tell you how much stock she had?

A. No, sir.

Q. Did she tell you when she got the stock?

A. No, sir.

Q. Did she tell you what dividends she got on it?

A. No, sir.

Q. Did she tell you whether or not the dividends on that stock was her only source of income?

A. No, sir. [88]

Q. Did she tell you whether she had any other property?

A. No, sir.

Q. Real estate?

A. No, sir.

Q. Personal property?

A. No, sir.

Q. Or anything else?

A. No, sir.

Q. Did she tell you whether she had any income at all?

A. No, sir.

Q. Did she tell you whether she held any mortgages?

A. No, sir.

(Testimony of Lester W. Hurley.)

Q. Mortgages from any of her relatives or her son, George Burton? A. No, sir.

Q. How old were you at that time?

A. In 1941? 1941?

Q. At that time.

Mr. McCormick: Just a minute. I think that it should be fixed with some definite certainty as to what time you are referring to.

Mr. Wynn: My question referred to the previous questions, when they were discussing this in 1941 at her residence in Kansas City, but I will supplement the question by adding "in 1941." [89]

A. Five years ago I was 32.

Q. Did she tell you where she kept her stock?

A. No, sir.

Q. Or her interests in the Edison Company?

A. No, sir.

Q. Or her interest in any stock?

A. No, sir.

Q. So the only thing she told you at that time was, she had some interest in some stock which sometime might benefit you? A. Yes, sir.

Q. No other discussion whatever concerning her financial condition? A. No, sir.

Q. And that was the only occasion that she ever did discuss with you her financial or property situation? A. Yes, sir.

Q. I think you have before you, do you not, Plaintiff's Exhibit No. 10, which is Dividend Order No. 12742? A. Yes, sir.

Q. When did you first see that document?

(Testimony of Lester W. Hurley.)

A. I would say approximately two weeks before the preceding trial.

The Court: That is the Kansas trial?

The Witness: Yes, your Honor. [90]

Q. (By Mr. Wynn): Prior to that time had you seen a photostatic copy of the document?

A. I had.

Q. And when had you seen that?

A. Oh, several days previous to that.

Q. Where did you see that photostatic copy?

A. In my attorney's office.

Q. You formed an opinion as to whether or not the purported signature thereon "Lester Hurley" was or was not your signature prior to the last trial, did you not? A. Yes, sir.

Q. And when did you form that opinion?

A. As soon as I saw the document.

Q. When you saw the original document?

A. The photostatic copy.

Q. You formed your opinion then?

A. Yes, sir.

Q. And after seeing the original document you did not change that opinion at all?

A. No, sir.

Q. But you are satisfied that the first time you saw the original was, roughly, two weeks before the trial? A. That is right.

Q. Which began in January of 1945?

A. That is correct. [91]

Q. Reading from your reported testimony in the

(Testimony of Lester W. Hurley.)

case of Burton versus Hurley, page 30 thereof—let me withdraw that question and reframe it so as to properly identify the instrument.

Reading, first, from page 24:

“I hand you plaintiff’s exhibit 8, dividend order bearing the signature, among others, of ‘Lester W. Hurley,’ the ‘Hurleey’ spelled, as you see, with two ‘e’s.’ Do you say that that signature ‘Lester W. Hurleey’ appearing immediately above the address ‘5716 Scarritt’ is not your signature?”

“A. In my opinion it is not my signature. You said ‘Lester W.’ It is ‘Lester Hurleey.’”

Did you so testify?

A. Yes, sir.

Q. Reading now from page 30, the same transcript:

“Q. Handing you again Plaintiff’s Exhibit 8, I will ask you whether at any time since the filing of this lawsuit or at any other time you have studied that so you know what it is?”

“A. Since the filing of the lawsuit, yes, sir.”

Did you so testify?

A. Yes, sir.

Q. Continuing: [92]

“Q. When was the first time that you saw that?”

“A. I saw a photostatic copy of it sometime along in March.”

Did you so testify?

A. Yes, sir.



(Testimony of Lester W. Hurley.)

“Q. Of what year? 1944?”

“A. Yes, sir.”

You so testified?

A. Yes, sir.

“Q. When was the first time that you saw this instrument itself?”

“A. The original instrument, I would say approximately two or three years ago.”

Now, did you so testify?

A. I believe there was an error there, sir. I think my answer to that question was “two or three weeks ago.” It was evidently an error in the transcription of it.

Q. So that if you did so testify, it was erroneous? A. That is right.

Q. And you had never seen that prior to two or three weeks before?

A. No, sir. I had seen the photostat first and this afterwards; so it couldn't have been previous to this date.

Q. Now, you testified at that time in the trial of the preceding action that, in your opinion, was not your signature, [93] while you testified to the court on your direct examination that it was not your signature? A. Yes, sir.

Q. Are you more positive at the present time than you were during the trial of the prior action?

A. No, sir.

Q. So when you testified in the prior action that it was your opinion that it was not, you meant that you were positive that it was not?

(Testimony of Lester W. Hurley.)

A. I was positive, yes.

Q. That there was no question whatever in your mind?

A. That is correct.

Q. I call your attention to Plaintiff's Exhibit No. 11, a document purporting to be signed by you in two places and witnessed by "Helen Burton and Paul H. Ditzen." Who prepared that instrument?

A. As I recall, it was prepared by the chief clerk in the office, in my office.

Q. And that was in the year 1931?

A. Yes, sir.

Q. You distinctly recall having signed that instrument?

A. Yes, sir; that is right.

Q. What was the occasion of Helen Burton signing the same as a witness? [94]

A. She was a stenographer in the office of an attorney there in Kansas City, Kansas, Paul H. Ditzen, who was an attorney, and he notarized the signature on this.

Q. So she signed that at your request?

A. Yes, sir.

Q. And she was approximately what age at the time?

A. Well, I would say 17 or 18, somewhere along in there.

Q. You distinctly recall the occasion of the execution of that document in 1931?

A. Yes, sir. [95]

\* \* \*

(Testimony of Lester W. Hurley.)

Redirect Examination

By Mr. McCormick:

Q. Now, Mr. Hurley, in your cross-examination you are asked as to whether or not you positively testified in your former trial that Plaintiff's Exhibits 1 to 7 were not your signatures. I call your attention to page 46 of the transcript prepared in the case of Burton vs. Lester W. Hurley and the Southern California Edison Company, No. 4974, and ask you to read the portion of page 46 beginning with the question:

“Q. Mr. Hurley, I will hand you Plaintiff's Exhibit 1,”

to and including the question relative to Exhibit

7. [103] A. To here, is it?

Q. Exhibit 7, yes. A. Yes, sir.

Q. Did you so testify in that case?

A. I did; yes, sir.

“Q. Mr. Hurley, I will hand you Plaintiff's Exhibit 1 and call your attention to the signature ‘Lester W. Hurley’ appearing on the assignment of stock and irrevocable power of attorney and ask you whether the signature ‘Lester W. Hurley’ written there is your signature? A. It is not.

“Q. I hand you Plaintiff's Exhibit 2 and ask you whether the signature on the assignment of the same type, the signature ‘Lester W. Hurley’ is your signature? A. No.

(Testimony of Lester W. Hurley.)

“Q. I hand you Plaintiff’s Exhibit 3 and ask you whether the signature ‘Lester W. Hurley’ appearing there is your signature?

“A. It is not.

“Q. I hand you Plaintiff’s Exhibit 4 and ask you whether the signature ‘Lester W. Hurley’ appearing there is your signature?

“A. It is not. [104]

“Q. I hand you Plaintiff’s Exhibit 5 and ask you whether the signature ‘Lester W. Hurley’ appearing there is your signature?

“A. It is not.

“Q. I hand you Plaintiff’s Exhibit 6. Is the signature ‘Lester W. Hurley’ appearing on that assignment your signature? A. It is not.

“Q. I hand you Plaintiff’s Exhibit 7 and ask you whether the signature ‘Lester W. Hurley’ appearing on the instrument is your signature? A. It is not.”

The Court: Is it stipulated, gentlemen, that the Exhibits 1 to 7 as identified in the Kansas action comprise the same documents as Exhibits 1 to 7 here?

Mr. Wynn: I will so stipulate.

Mr. McCormick: Yes, your Honor. [105]

\* \* \*



Wednesday, November 13, 1946, 2:00 P.M.

Mr. Wynn: Defendant calls Mr. Jones. Take the stand, Mr. Jones, and be sworn by the clerk.

ROBERT N. JONES

called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Robert N. Jones.

Direct Examination

By Mr. Wynn:

In connection with the testimony of this witness, if the court please, I wish to state that I am calling him out of order, in that I normally would not present this witness at this time at the opening of my case. However, he is here from the Middle West and has made reservations to return there on the train tonight, and I would like to elicit his testimony now.

Q. What is your full name, Mr. Jones?

A. Robert Neil Jones.

Q. Where do you reside?

A. Kansas City, Missouri.

Q. How long have you resided in Kansas City, Missouri? [2\*]

A. About 20 years.

Q. What is your present business or occupation?

A. At the time, I am unemployed, through physical condition.

(Testimony of Robert N. Jones.)

Q. Were you employed in the year 1928?

A. Yes.

Q. What was your employment at that time?

A. I was employed by the Kansas City Terminal in the passenger service.

Q. Is that in Kansas City, Missouri, or Kansas City, Kansas?

A. It is Kansas City, Missouri.

Q. And where is it located?

A. At the Union Station, about 24th and Pershing Road, or 24th and Main Street.

Q. Over what period of time were you employed there?

A. I was employed from 1921 until 1927. I had a leave of absence and went back in '27 and was there until 1931, until February.

Q. In what capacity were you employed?

A. I was employed first as an usher and then as a gate man.

Q. When did your employment as gate man begin?

A. My employment as gate man began in 1928, about February. [3]

Q. Now, can you describe what your duties were as gate man?

A. I was loading departing trains, taking care of passengers, inspecting tickets to see if they were on the right trains. At that time we had to give our punch system on each ticket to signify that the passenger was going to the right train.

Q. Where in the station did you carry out such duties?

(Testimony of Robert N. Jones.)

A. Through the main waiting room, from Gate No. 1 through the Gate 16.

Q. Where did you reside in 1928?

A. At 3829 Garfield.

Q. In what city?

A. Kansas City, Missouri. Pardon me.

Q. Are you acquainted with a Mr. George Burton?

A. Yes, sir.

Q. Is he in the court room?

A. Yes, sir.

Q. Sitting on my left at the counsel table between the two gentlemen?

A. Yes, sir.

Q. How long have you known Mr. Burton?

A. I have known Mr. Burton since 1921.

Q. How did you first become acquainted with him? [4]

A. We were employed by the same company. Mr. Burton was employed in the capacity of information clerk when I was first employed as an usher before taking this gate job.

Q. Where did Mr. Burton perform his duties?

A. In the information booth in the center of the main lobby in what is known as the west end.

Q. Of the Union Station?

A. Of the Union Station.

Q. To your knowledge, was he employed at that situation and in that position in the year 1928?

A. Yes, sir.

Q. What were your hours of employment?

A. From 3:30 p.m. until midnight.

Q. Did you ever vary from that shift?

(Testimony of Robert N. Jones.)

A. No, sir, not in the last four years that I was with the company, that was my regular hours.

Q. Did you have a day off?

A. I had Sundays off.

Q. What were Mr. Burton's hours of employment, if you know?

A. Mr. Burton worked an alternating shift, I believe, that changed every two weeks. In fact, I know it did. He worked four to midnight, or 3:30 to midnight, with 30 minutes for lunch period, and for the next two weeks he was from, I [5] believe, 7:00 until 3:00, or 7:00 until 3:30.

Q. I hand you now a document, Mr. Jones, marked Plaintiff's Exhibit 13 in this action, and ask you to inspect the document. Do you find a signature thereon purporting to be your signature "R. N. Jones"?

A. Yes, sir.

Q. Is that your signature?

A. It is.

Q. Below the signature appears to be an address in writing consisting of figures and words. Is that address in your writing?

A. It is.

Q. Will you please describe to the court the circumstances surrounding your affixing your name and address to that document?

A. Well, at this particular time, I made inquiries on Door A, which was announcing arriving trains between the hour——

Mr. McCormick: Just a moment, if the court please. I object to the question or the answer unless he indicates as to what particular time he is speaking about.



(Testimony of Robert N. Jones.)

Mr. Wynn: Yes. I will stipulate that the question may be withdrawn, and substitute this question:

Q. Do you recall approximately when you affixed your signature to that document? [6]

A. Yes, sir.

Q. Approximately when?

A. Between the hour of 6:30 and 7:00 o'clock, p.m.

Q. Do you recall the year?

A. Well, no, sir; not——

Q. Do you recall the month of the year?

A. I do not. The only thing that would cause me to remember—not definitely—would be late in season, due to the fact that we were in full uniform, wearing our coats, and the building was heated. So it would be in the late fall or early winter.

Q. Do you recall the day of the week?

A. No, sir.

Q. Now will you describe to the court the circumstances surrounding the affixing of your signature and the address to that document?

A. Mr. Burton called me over from my post, which was a short distance from Door A to the information booths.

Q. How far was it?

A. I would say 20 to 25 feet.

Q. You may continue.

A. Yes, sir. And asked me to witness a signature.

(Testimony of Robert N. Jones.)

Q. Was there anyone else at the information booth at the time? [7]

A. Mr. Burton was—as I recall it, I don't know whether his associate in that booth was out to lunch or not. But I was introduced to a gentleman by the name of Lester Hurley and was asked to witness a signature on this document on which my name appears.

Q. Can you now recognize that person introduced to you as Lester Hurley? A. No, sir.

Q. He is in the court room at the present time. You cannot recognize him?

A. No, sir; I can't.

Q. Now, did the person so introduced to you sign the document before you did?

A. Yes, sir.

Q. Do you know in relation to the signature he affixed to the document where your signature appeared?

A. Would you state that again, please?

Mr. Wynn: Mr. Reporter, will you please read it?

(Question read by the reporter.)

A. I don't think I understand.

The Court: The witness does not understand the question. I suggest you rephrase it.

Q. (By Mr. Wynn): At the court's suggestion, I will rephrase the question. Do you now recall whether you signed your signature both below and/or to the side of the signature [8] there affixed in your presence?

(Testimony of Robert N. Jones.)

A. I signed, affixed my signature below, below and to the side, as this document shows, this instrument.

The Court: The witness refers to Plaintiff's Exhibit 13, is that correct?

The Witness: Below and to the left; yes, sir.

Q. (By Mr. Wynn): Did you ever meet a Lester Hurley after that date? A. No, sir.

Q. Now, was that all that transpired on that occasion?

A. Yes, sir. Immediately I went back to my post from there on. That is all I have any information of.

Q. Now, you testified that you are acquainted with Mr. George Burton here in the court room. When is the last time that you have seen him?

A. In 1931 up until yesterday.

Q. Up until the time of this trial?

A. That is right.

Mr. Wynn: You may cross-examine.

### Cross-Examination

By Mr. McCormick:

Q. Mr. Jones, where do you reside at the present time?

A. 1808 East 82nd Street Terrace, Kansas City, Missouri. [9]

Q. And did I understand you to say that you are still in the employ of the railway company?

A. No, sir. I left them in 1931.

Q. And your present employment is what?

(Testimony of Robert N. Jones.)

A. I am unemployed at the present time.

Q. Unemployed. Where did you reside prior to the address which you gave as your present residence?      A. 4421 Prospect.

Q. And did you reside at that address for some period of time?      A. Yes, sir.

Q. How long?

A. I would say about three years.

Q. State, if you will, how many different residences or locations you have had in Kansas City over the 20 years in which you have lived in Kansas City?      A. Well, I would say five.

Q. I believe you stated in your direct testimony that you had a leave of absence during the time that you were employed by the Terminal Railway Company?      A. Yes, sir.

Q. Over what period of time did that leave extend?

A. That extended from July 1st of 1927 until September 21st of the same year.

Q. I believe you state, as your memory of this transaction [10] which you have related, that this occurred between 6:30 and 7:00 o'clock p.m.

A. Yes, sir.

Q. Was that in the morning or the evening?

A. That is p.m., in the evening.

Q. And what, if anything, caused you to be so certain after this length of time that this occurrence took place at that hour?

A. I made a relief at that time of the evening for the gate man who was working Door A, which



(Testimony of Robert N. Jones.)

is about 20 feet from the information booths, from arriving trains, and from 6:30 until 7:00 was his relief and I took care of that until he returned.

Q. Was that a very unusual occurrence?

A. No, that was quite frequently.

Q. If that was a frequent occurrence, what, if anything, causes you to remember now with apparent definiteness and certainty that this witnessing of this signature took place at that time?

A. That would have been the only time in the evening, in the hours in which I was employed, through my shift that I would have been around the information booth at all, due to the fact that I would have been in the back of the waiting room.

Q. And is it by reason of that fact that you now have [11] deduced or concluded that this must have occurred at that time, if it occurred at all?

A. It did.

Q. Is that your reasoning? You have no independent recollection?

A. Yes, I have. I recollect it happened at that time in the evening.

Q. Now, Mr. Jones, was this merely an incidental matter that occurred at that time? Did you think about it? Was there anything about it of such a nature as to cause you to keep it in your mind or remember it?

A. Well, due to the fact that I had previously to that had to witness another one of our own men's signing on some oil stock, and it came to me that

(Testimony of Robert N. Jones.)

I had made two witness signatures in a short period of time. That is the only way that I recalled it.

Q. Just due to the fact that you had witnessed another party's signature that caused you to remember witnessing this one, is that it?

A. Yes, sir.

Q. You were asked, Mr. Jones, as to the location of your signature. You say that is your signature on the instrument before you, Plaintiff's Exhibit 13, do you?     A. Yes, sir.

Q. Do you have any independent recollection of where [12] you placed your signature upon that instrument except from the examination of the instrument itself?     A. No, sir.

Q. So when you were testifying in answer to counsel's question that you had a recollection of where your signature was placed, that was only due to the fact that you were then looking at the instrument, is that right?     A. That is right.

Q. What particular place in the Union Station, if you know, was this instrument signed?

A. At the information booths.

Q. Was that the information booth that you say was presided over by Mr. Burton?

A. Yes, sir.

Q. Are you acquainted with the location of the Missouri Pacific Railroad Shops in Kansas City?

A. No, sir.

Mr. Wynn: Pardon me just a minute. As of today or as of that date?

(Testimony of Robert N. Jones.)

Mr. McCormick: As of that day or as of today.

The Witness: I could go to them, but I couldn't tell you the address.

Q. (By Mr. McCormick): Well, do you have in your mind an idea as to the distance that those shops are located from the Union Station, the place where you were employed? [13]

A. What shops are you referring to?

Q. To the Missouri Pacific.

A. The Missouri Pacific has many different shops in Kansas City, that is, many different locations.

Q. The Missouri Pacific shops have a location in the East Bottoms?      A. East Bottoms?

Q. Yes.

A. I would say approximately six miles.

Q. Who asked you to witness this signature?

A. Mr. Burton.

Q. Did he leave his information booth in order to locate you?

A. No, sir. He called me over.

Q. Now as to the man who placed his signature, as you say, upon this instrument, you were not acquainted with him?      A. No, sir.

Q. And as to whether it was Lester Hurley or someone else, you merely took the word of Mr. Burton who, I presume, introduced you to the gentleman?      A. I did.

Q. Who first inquired of you concerning this transaction?



(Testimony of Robert N. Jones.)

A. Mr. Stripp, Mr. Douglas Stripp, in Kansas City. [14]

Q. And when was that inquiry made?

A. That was made in June, I believe, of this year.

Q. Are you here at the present time by reason of any process or by voluntary arrangement as between Mr. Stripp or other parties connected with this litigation?

A. I volunteered.

Q. And who made those arrangements with you to come to California?

A. Mr. Stripp.

Q. Do you know who Mr. Stripp was representing in the making of those arrangements?

A. No, sir. That was not discussed. He didn't tell me at all.

Q. I believe you said that the last time that you recall having met Mr. Burton was in 1931?

A. Yes, sir.

Q. You have had no communications from Mr. Burton since 1931 up to the present time?

A. No, sir.

Q. I believe you stated that the only recollection that you have as to the time that this was, that it was possibly in the late fall or winter?

A. Yes, sir.

Q. And that was only due to the fact that you had a heavy uniform on at the time? [15]

A. That is right.

Q. Do you associate the manner in which you were dressed with the matter of witnessing this signature?



(Testimony of Robert N. Jones.)

A. I do not associate the manner in which I was dressed with the matter of signing the signature. As the question was asked me, if I recalled about the time of year.

Q. Well, then, did you recall the time of year independently as to whether you were wearing heavy or light clothes, or did you recall the time of year by reason of the manner in which you were dressed?

A. I recall from the time of year in the manner in which we were wearing our heavy uniform. All doors were closed and the station was under heat.

Q. Well, this was quite an incidental matter to you, was it not, Mr. Jones?

A. Yes, sir.

Q. Had you ever thought of it again until Mr. Stripp communicated with you?

A. No, sir.

Q. Did Mr. Stripp present to you the instrument which is now before you, Plaintiff's Exhibit 13, for your examination?

A. I believe a photostatic copy was presented to me for examination.

Q. I think you stated that you have no recollection [16] as to what year it might have been as to when this instrument was signed.

A. Yes, sir.

Q. How well acquainted were you with Mr. Burton during the time you worked there? Were you socially good friends or casual acquaintances?

A. Just casual acquaintances through employees' associations.

Mr. McCormick: That is all.

Mr. Wynn: No further questions. May this witness be excused, if the court please?

Mr. McCormick: As far as I am concerned.

The Court: You are excused from further attendance.

(Testimony of George E. Burton [17] follows.)

Wednesday, November 13, 1946, 2:00 P.M.

Mr. Wynn: Mr. Burton, will you take the stand?

### GEORGE E. BURTON

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: George E. Burton.

### Direct Examination

By Mr. Wynn:

Q. Mr. Burton, in answering my questions will you try to speak loudly enough so that I can hear you standing back here at the lectern? Are you related to the plaintiff Lester Hurley in this action?

A. Yes, sir.

Q. What is your relationship?

A. I am his uncle.

Q. What is your present business or occupation, Mr. Burton?

A. I am retired.

Q. And when did you retire?

A. Four year ago the 1st of October.

(Testimony of George E. Burton.)

Q. Prior to that time what was your occupation?

A. The last three years of my employment with the Terminal Company I was at the station called Central Avenue [2\*] Station in Kansas City, Kansas.

Q. And before that date where were you employed?

A. I was at the Union Station.

Q. Where was that located?

A. In Kansas City, Missouri.

Q. And what was your employment there?

A. Just prior to going to the Central Avenue Station I was red-capping and extra gateman.

Q. And prior to that time what was your employment?

A. I was in the Information Bureau from 1921, until 1933. When that was abolished, then I was out of service in '33 to '35.

Q. Where was this information bureau, as you call it, located?

A. It is located in the west lobby of the Union Station.

Q. What were your hours of employment?

A. We alternated from 7:00 until 3:30 and from 3:30 until midnight.

Q. How frequently did you do that?

A. Every two weeks.

Q. How many days of the week did you work?

A. Six.

Q. What day did you have off?

A. Saturdays.

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of George E. Burton.)

Q. Now, what was your mother's name? [3]

A. Elizabeth J. Price.

Q. That was at the time of her death?

A. Yes, sir.

Q. Do you have any other brothers or sisters?

A. I had a sister that passed away in 1924.

Q. Is the plaintiff Hurley in this action related to her? A. He was her son.

Q. Did she have any other children?

A. She had one child that died at birth.

Q. Before or after the birth of Mr. Hurley?

A. Before.

Q. Do you have any children?

A. I have five boys and three girls living, and lost two boys at birth.

Q. Is one of your daughters named Helen?

A. Yes, sir.

Q. Is she married at the present time?

A. She is; yes, sir.

Q. And what is her name now?

A. Sanders, S-a-n-d-e-r-s.

Q. What is her age?

A. Helen was born in 1912, would make her 34.

Q. In the year 1928, where did your mother, Mrs. Price, reside? [4]

A. 1301 West 52nd, Los Angeles.

Q. How long had she resided there?

A. They came to California in 1916, and they lived at some other address—I don't recall it—for about two years, but she resided at 1301—well, I would say from 1920, until '31.



(Testimony of George E. Burton.)

Q. Were you acquainted with her husband?

A. I was.

Q. How long were you acquainted with him?

A. About 1910-1908; between '08 and '10.

Q. Until the date of his death?

A. Yes, sir.

Q. And that occurred when?

A. On the 5th of January in 1929.

Q. How do you fix that date?

A. I received a wire on the 1st of January from mother to come, and I arrived here on the 4th and he died the 5th.

Q. Between the date of your mother's removal to Los Angeles and the date of her husband's death had you visited them in this city?

A. I had; yes, sir.

Q. Can you now recall the dates of such visits?

A. Not exactly. I was here about four times before Mr. Price passed away; and it was in '25 and '26 and '27, and I might possibly have been out here in '24 but I don't recall it. [5]

Q. Were you here in Los Angeles prior to the date of the death of Mr. Price?

A. I was here in 1928, in the summer, June or July, along in there. I don't recall the month.

Q. And you came again in January of 1929?

A. Yes, sir.

Q. Then did you return to Kansas City with your mother? A. Yes, sir.

Q. Where was the funeral of Mr. Price conducted?

(Testimony of George E. Burton.)

A. Gibson's Mortuary at 7th and State, Kansas City, Kansas.

Q. Did you and your mother take the remains back there?

A. Yes, sir. Do you mean the funeral here? Pardon me.

Q. I was not referring to the funeral here, but did a funeral occur in Los Angeles?

A. They had it at Long Beach.

Q. And what date was that?

A. I think it was about the 7th of January.

Q. And when did you return to Kansas?

A. We left here on the 14th.

Q. What time did you arrive in Kansas?

A. The 17th.

Q. What hour?

A. It was in the morning. I don't remember the exact [6] hour.

Q. When was the funeral held in Kansas?

A. It was held in the afternoon of the 19th.

Q. Do you recall the hour?

A. Two-thirty, I think, was the hour in the afternoon.

Q. Do you recall who acted as pallbearers at that funeral?

A. There was four of my boys and my son-in-law and Lester.

Q. By "Lester" you mean Lester Hurley, the plaintiff in this case?      A. Lester Hurley.

Q. Where did your mother stay after returning

(Testimony of George E. Burton.)

from Los Angeles? A. She stayed at home.

Q. Where was that located?

A. 1046 Ann Avenue, Kansas City, Kansas.

Q. Where is your residence in relation to the place at which the funeral was conducted?

A. Approximately six blocks.

Q. Are you familiar with the location of The Brotherhood State Bank? A. Yes, sir.

Q. Where is it located?

A. At 8th and Minnesota, Kansas City. [7].

Q. With relation to your home how far away is it? A. About three blocks and a half.

Q. Now directing your attention again to the fall of 1928, did you receive any document or documents at that time in any way relating to any stock in the Southern California Edison Company?

A. I received dividend orders from mother.

Q. Do you recall approximately when you received them?

A. I don't remember the exact date but it was along around in the 20th, I guess, 21st.

Mr. McCormick: I did not get that answer. Twentieth of what month?

The Witness: Twentieth of November.

Mr. McCormick: Thank you.

Q. (By Mr. Wynn): How many such documents did you receive?

A. I received two and two separate letters.

Q. I show you now Plaintiff's Exhibit 10 and Plaintiff's Exhibit 13 and ask you to inspect the

(Testimony of George E. Burton.)

same and state whether or not those are the documents to which you refer?

A. Yes, sir; they are.

Q. Which of these documents did you first receive?

A. It was the one—this first one here. I don't know. It is "12742."

Q. And that is marked at the top as Plaintiff's Exhibit? [8]

A. No. 10.

Q. No. 10?

A. Yes, sir.

Q. Now, at the time you received that document was there any writing thereon in addition to the printed matter?

A. Yes, sir; there was.

Q. What writing was on the document?

A. Well, the writing above "Mrs. Elizabeth J. Price."

Q. Are you referring to the signature?

A. No. "Elizabeth J. Price," "Mrs. Elizabeth J. Price" and "George E. Burton" and "Lester Hurley." That was on along with mother's signature.

Q. Now you are referring consecutively to the handwriting appearing on the first printed line and the second and third printed lines of the document?

A. That was on; yes, sir.

Q. And you are referring to——

A. A signature.

Q. ——the signature of "Mrs. Elizabeth J. Price" appearing after the word "Signature"?

A. Yes, sir.



(Testimony of George E. Burton.)

Q. Was the date appearing at the top of the document on it at the time?

A. It was; yes, sir. Yes, sir.

Q. Was the check mark appearing after the printed [9] word "Common" and the parentheses enclosing the figures "575" and the word "shares" on the document at that time, if you know?

A. Well, I don't recall them figures on there at the time.

Q. Now, what did you do with that document after you received it?

A. After I received it I signed it. And in mother's letter, she says, "Have Lester sign it and return it to me at once," which I did.

Mr. McCormick: Just a moment. I object to that latter part of that answer and ask that it be stricken out.

The Court: Which portion?

Mr. McCormick: About the "Lester signed it." It is what he did. It called for an answer as to what he did, not what he had not done.

The Court: Motion granted, beginning with the witness' statement as to what the letter said.

Q. (By Mr. Wynn): Now, after receiving this document did you communicate in any way with your nephew, Lester Hurley?

A. I think one of the children went over and got him. I don't remember just how they went, but he came to the house.

Q. What time of the day or evening did he come?

(Testimony of George E. Burton.)

A. It appears to me it was in the evening. [10]

Q. Before or after dinner?

A. After dinner.

Q. What did he do or what did you do after he came to your home?

Mr. McCormick: Now, just a moment, if your Honor please. The question that is now being asked tends to indicate that there is a desire here to elicit from this witness a statement as to whether or not Lester Hurley placed the signature upon this instrument which purports to bear the name of Lester Hurley. I object to this testimony and any testimony of this character with respect to the instrument in question, for the reason it is an attempt to make a collateral attack upon a judgment which is of the United States District Court for the District of Kansas wherein that particular issue as to whether he placed his signature upon this document occurred or not, as to whether or not the particular signature is a forgery, which question was a definite issue in that case and it was there determined that the signature was a forgery and that it was not the signature of Lester Hurley. This constitutes an effort to attack that judgment and to ask this court, by reason of the evidence given, to disregard and fail to give full faith and credit to a final, binding judgment, contrary to the provisions of the "full faith and credit clause" of the Constitution and Statutes passed in pursuance thereof. [11]

The Court: That brings up the same question we have with respect to the pleadings, findings, and

(Testimony of George E. Burton.)

judgment offered as Exhibit 14, Exhibit 14 for identification here. I will admit this witness' testimony at variance with the findings and the judgment of the court of the District of Kansas, and any testimony at variance with those findings or contrary or inconsistent with them will be received subject to a motion on the part of the plaintiff to strike at a later time if so advised, and that motion, of course, will turn upon the court's ruling with respect to the admissibility of Plaintiff's Exhibit 14 for identification. Clearly, this witness is bound by both the findings and that judgment, but the question still remains whether the defendant is barred by the findings.

Mr. McCormick: Quite true, your Honor. Thank you.

Mr. Wynn: May we have the pending question read?

The Court: Will you read it, please, Mr. Reporter?

(Question read by the reporter.)

A. Well, I believe I showed him the letter that I got from mother where she explained what she had asked to have done and he signed it.

Q. In your presence? A. Yes, sir.

Q. In the presence of any other person?

A. Well, it is witnessed by Helen, my daughter. [12]

Q. Was she present?



(Testimony of George E. Burton.)

A. She was, and I think there was two or three others around.

The Court: We will take the afternoon recess at this time of five minutes.

(Short recess.)

Q. (By Mr. Wynn): Prior to the recess, Mr. Burton, you were testifying with reference, I believe, to Plaintiff's Exhibit No. 10, being dividend order 12742. What did you do with that document after it was signed, as you say, by Lester Hurley?

A. I returned it to mother.

Q. Here in California? A. Yes, sir.

Q. And when did you return it?

A. Well, I think that same night. Her letter of instructions was to get it back as soon as possible.

Q. Now I direct your attention to Plaintiff's Exhibit No. 13 which is before you and ask whether you received that document?

A. I did, yes, sir.

Q. From whom? A. Mother.

Q. And what did you do with it after its receipt?

A. She had the same instructions in the other letter [13] as she had in the first.

Q. Did you make any effort to get in touch with Lester Hurley after its receipt?

A. Yes. I think one of the children went over and told him about it.

Mr. McCormick: Just a moment. I object to the



(Testimony of George E. Burton.)

statement of the witness as to what he thinks, and ask that he be required to state what he knows.

Q. (By Mr. Wynn): Well, is that your best recollection?      A. Yes, sir.

Q. Now, did you meet with Lester Hurley after receiving that document from your mother?

A. Yes, sir.

Q. Where did the meeting take place?

A. It took place at the Union Station.

Q. In what year?      A. In 1928.

Q. And do you recall the month?

A. November.

Q. What time of the day?

A. Well, it was in the evening.

Q. Approximately what time?

A. Between 6:00 and 7:00 o'clock.

Q. Were there any other persons present at that meeting?

A. Well, there was always the two of us in the [14] information bureau, but I don't recall the other party that was working with me, but I called Jones over from the door A and introduced him to Lester and asked him if he would witness his signature.

Q. Did Lester Hurley sign the document in your presence?      A. He did.

Q. And in the presence of R. N. Jones?

A. Yes, sir.

Q. And this Mr. Jones was the witness who testified last in this court room?      A. Yes, sir.

(Testimony of George E. Burton.)

Q. Was Mr. Hurley standing or sitting at the time he signed?      A. He was standing.

Q. Did Mr. Hurley sign before Mr. Jones?

A. Yes, sir.

Q. And then Mr. Jones signed in your presence?

A. Yes, sir.

Q. And in the presence of Mr. Hurley?

A. Yes, sir.

Q. Did anything else transpire at that meeting?

A. Nothing that I can recall only——

Q. What did you do with the document then?

A. Well, I returned it to mother by mail.

Q. With reference to that document, when you received [15] the same was there any writing thereon other than the writing appearing on and below the first printed word "Signature"?

A. Was any writing below here?

Q. That is correct. I am indicating any writing below the printed word "Signature," the first printed word "Signature."

A. Mother's signature was on there, "Elizabeth Jane Price."

Q. And her address?

A. "1301 West 52nd," yes, sir; that was on.

Q. But no other writing below that?

A. No, sir.

Q. Was there any writing above that?

A. Yes; there was.

Q. On the first printed line was there any writing?  
A. Above, do you mean?

(Testimony of George E. Burton.)

Q. The first printed line on the document.

A. "Elizabeth Jane Price" was on.

Q. And on the next two printed lines was there any writing?

A. Yes; "Elizabeth Jane Price and George E. Burton and Lester Hurley."

Q. Appearing after the word "Common" was there a check mark, parentheses, figure "88," word "shares" in parentheses on that document? [16]

A. I don't recall them being on at the time.

Q. Do you recall whether there was a check mark and the figures and words "(191 shares)"?

A. No, sir; I do not.

Q. Do you recognize the handwriting which you have testified was on the document at the time you received it?

A. My mother's handwriting. Her signature here is all of hers. The others I don't know.

Q. Yes. What about any other handwriting on the document?

A. No; I don't know. I don't recognize any handwriting except hers.

Q. Then the handwriting I have referred to on the printed lines on the document you cannot identify?

A. No, sir.

Q. Is that true of Plaintiff's Exhibit No. 10?

A. Yes.

Q. To which you have previously testified. [17]

\* \* \*

Q. Now recalling your attention to this informa-

(Testimony of George E. Burton.)

tion booth in the Union Station, can you describe for us the size?

A. Well, it was a hexagon shape, marble. Oh, I would say it was probably 10 feet across. [20]

Q. And in the shape of a hexagon?

A. Yes, sir.

Q. And did it have a counter surrounding it?

A. No, sir; it was just the path, flat. Well, it was a counter all the way around, you might call it.

Q. What material was the counter composed of?

A. It is marble.

Q. About what height was this counter?

A. Oh, I would say it was four feet.

Q. And what was the width?

A. Probably two.

Q. Were there any pens or other writing instruments on it? A. No, sir.

Q. How long have you known the witness, Mr. Jones, who previously testified?

A. Well, I got acquainted with him shortly after he went to work there, just in the way of seeing him the same as any other employee that would be employed there.

Q. And prior to the time of this trial when had you last seen Mr. Jones to your knowledge?

A. Well, it was back in '31.

Q. Now, were you acquainted with the financial affairs, property affairs of your mother during her lifetime? A. Most all of it; yes, sir. [21]

Q. In the fall of 1928, did you know what her financial condition was at that time?



(Testimony of George E. Burton.)

A. No, sir; I did not.

Q. After the death of Mr. Price in January of 1929, did you learn what her financial condition was?      A. I did.

Q. What property did she have?

A. According to Mr. Price's will the home was left to her during her lifetime, and then what stock she had in the Edison Company.

Q. Do you know what stock she had in the Edison Company?

A. I knew after Mr. Price's death. She showed me the certificates at that time.

Q. Did she have any other property from which she received any income?

A. Not at that time; no, sir.

Q. Did she at any time after Mr. Price's death have any other property?

A. She didn't have any property. She had two mortgages, one in Compton and, I believe the other was in Watts.

Q. Approximately what amounts?

A. Well, the mortgage was for a thousand dollars on each place.

Q. And the sole source of income was from the dividends on this Edison Company stock to the best of your knowledge? [22]      A. Yes, sir.

Q. And that stock included the stock involved in the present action, did it?      A. Yes, sir.

The Court: There was other and additional stock?

(Testimony of George E. Burton.)

The Witness: You mean 575 shares, 191 of preferred and 88 of common?

The Court: Was there other stock which your mother owned?

The Witness: No.

The Court: In other words, the stocks involved in this action is all the stock that she had?

The Witness: Was all the stock she had; yes, sir.

The Court: At any time?

The Witness: No. She had—later on, she had 40 shares. My daughter, Mrs. Jones—that was about, oh, two or three years afterwards that she had purchased that.

The Court: Following the death——

The Witness: Of Mr. Price; yes, sir.

The Court: Of Mr. Price. That was in 1929?

The Witness: That is when he passed on, but this was several years later when she purchased it.

The Court: How old was Mr. Price when he died?

The Witness: He was 98—around 89.

Q. (By Mr. Wynn): How old was your mother at the time [23] of her death?

A. She was 95 and would have been 96 in July.

Q. I now hand you Plaintiff's Exhibits 1 through 7, inclusive, and ask you to examine the document attached to each of those exhibits entitled "Assignment of Stock and Irrevocable Power of Attorney." Each of the documents to which I have referred appears to bear the signature of your

(Testimony of George E. Burton.)

mother, Mrs. Price, and of yourself, Mr. Burton.

Are those your signatures?           A. Yes, sir.

Q. They also appear to bear the signature of the plaintiff, Lester Hurley, or Lester W. Hurley, as it appears on those documents. Are those his signatures?           A. Yes, sir.

The Court: Did you see him sign them?

A. Yes, sir.

Q. (By Mr. Wynn): Now, do you recall or can you give us any idea as to the time that those documents were signed?

A. It has been brought before my attention quite a number of times in the last year or two, and I set the date as on the 18th of December in 1929—pardon me, 18th of January, 1929.

Mr. McCormick: Do I understand your answer to be that you did set the date at that, or that you could now set the date at that? [24]

The Witness: I now set the date at that, as the 18th of January in 1929.

The Court: Is that two days after Mr. Price's funeral?

The Witness: No. That was before Mr. Price's funeral.

The Court: His funeral was on the 19th?

The Witness: His funeral was on the 19th; yes, sir.

Q. (By Mr. Wynn): You had arrived back in Kansas City on the 17th, had you?

A. Seventeenth; yes, sir.

(Testimony of George E. Burton.)

Q. What day of the week did the funeral take place? A. It was on Saturday.

Q. So that by reference to the date you returned to Kansas City and the date of the funeral you now fix the date that these signatures were affixed?

A. As on the 18th; yes, sir.

Q. At that time did anyone else affix a signature to that document?

A. Yes; mother, Lester Hurley and myself.

Q. Did you understand my last question?

A. No; probably I didn't, sir.

The Court: He answered it.

Mr. Wynn: I did not think that he did.

Q. I said, did anyone else other than the three of you attach a signature to that document?

A. Yes, sir; my first wife. [25]

Q. And did anyone in addition to her?

A. Well, I don't think that Alberti's signature was on. If it was on, it was put on after we left.

Q. Now I direct your attention to the fact that there appear to be three signatures by Mr. Alberti on that document. Do you recall whether any one of those three signatures were affixed at that time?

A. They were not when we signed them.

Q. Well, after you signed them and while you were still present?

A. He might have signed them right then but I didn't notice it.

Q. After you signing those documents, as you have testified, and Mr. Hurley signing them did you ever see them again?



(Testimony of George E. Burton.)

A. No; I didn't. Pardon me. I saw them once after that, not for examination, but I saw them on the desk at the bank.

Q. On whose desk?           A. Mr. Alberti's.

Q. Well, approximately when was that with relation to the date that you signed?

A. Oh, I would say two weeks.

Mr. McCormick: Pardon me. Do I understand your answer to be that you saw these certificates of stock or merely the assignment? [26]

A. I saw the stock certificates, or the papers were on the desk and Mr. Alberti had called me, saying that there was a correction that he had to make out and that there was an "and" or it should be "or"; that there was "or" on there and it should be an "and."

Mr. McCormick: And the assignment that you are talking about upon which signatures appear at the time that you saw them two weeks after the signatures were affixed upon Mr. Alberti's desk and attached to the certificates of stock themselves?

A. Yes, sir.

Q. (By Mr. Wynn): Do you know whether the actual stock certificates were then attached to the assignments?           A. Yes.

Q. Did you pick them up and look at the stock certificates?

A. No; they were laying on the desk.

Q. They were lying on the desk as the documents are now lying in front of you?           A. Yes, sir.

(Testimony of George E. Burton.)

Q. As the documents are now lying in front of you can you see any colored paper?

A. No, sir.

Q. Were they turned over so that you could see colored paper while they were there? [27]

A. No; they were on the other side.

The Court: You are referring now to Exhibits 1 to 7?

Mr. Wynn: One to 7. Thank you, your Honor.

Q. Since that date in the year 1929, have you ever seen the documents now before you, that is Plaintiff's Exhibits 1 through 7, until the present date? A. No, sir. These, you mean?

Q. Yes; indicating Plaintiff's Exhibit 1 through 7.

A. I have seen them at the other trial, these documents here.

Mr. McCormick: If your Honor please, I apologize for interrupting, but I would like to have this matter cleared up as to what the witness' answer is one way or the other if I may at this time before it is left. As I understood his answer as first made, that he saw these instruments upon the desk of Mr. Alberti about two weeks after the signatures were affixed, meaning the entire instruments, the stock certificates and the assignments. And I would like to know whether that is the answer.

The Court: Is that your answer?

The Witness: Yes, sir.

Mr. McCormick: Thank you.

The Court: Is there a pending question?

(Testimony of George E. Burton.)

Mr. Wynn: I do not believe there is. You did not object to the pending question? [28]

Mr. McCormick: I did not.

Q. (By Mr. Wynn): What time of the day did the affixing of these signatures occur in fact?

A. I think it was in the morning.

Q. Did anyone accompany you to the bank when you went?

A. My mother, my wife, myself, and Lester was there.

Q. Was Lester, meaning Lester Hurley, there in the bank when you arrived?

A. No. I think we all went in together.

Q. Where had you met?

A. We met at my home. Mother was staying there and Lester came over.

Q. And this was on the day before the funeral?

A. The day before the funeral; yes, sir.

Q. Had Lester called at your home after your arrival from California prior to this occasion on the 18th?

A. I think he was there on the same day that we arrived.

Q. When you left the bank after affixing the signatures did you all leave together?

A. Yes, sir.

Q. What did you do then?

A. Well, he walked across the street to take a streetcar, and mother and I and my wife went home.

Q. Across the street from where? [29]

A. From the bank.

(Testimony of George E. Burton.)

Q. Your wife went home with you?

A. Yes, sir. [30]

\* \* \*

Mr. Wynn: Mr. Burton, will you take the stand again?

GEORGE E. BURTON  
(Recalled)

Direct Examination  
(Resumed)

By Mr. Wynn:

Q. Mr. Burton, I hand you Plaintiff's Exhibit 12 and ask you to please inspect it.

A. Yes, sir.

Q. When, if you know, was the plaintiff, Mr. Hurley, first married?

A. On about December the 19th in 1927.

Q. Did you attend the wedding?

A. No, sir.

Q. When did you learn of his marriage?

A. Oh, I guess it must have been several weeks afterwards.

Q. Do you know where he was married?

A. No. I understood it was at [32] Independence.

Cross-Examination

By Mr. McCormick:

Q. Now, Mr. Burton, will you state to the court as to where you live? What is your home?



(Testimony of George E. Burton.)

A. 1046 Ann Avenue in Kansas City, Kansas.

Q. And how long have you lived in Kansas City, Kansas?

A. Sixty-nine years.

Q. What is your present age?

A. Sixty-nine. I was born and raised there.

Q. When did you arrive in California on this trip?

A. A week ago today, Friday.

Q. State to the court at whose request that you came to California this time?

A. No request. I volunteered.

Q. No process served upon you requiring you to appear in this case?

A. No, sir.

Q. Have you consulted with counsel relative to this case since arriving in California?

A. Only what has been here about it—I went to his office the first morning.

Q. Now, by what has been here and his office, whose office do you mean?

A. Mr. Wynn's.

Q. You did consult with Mr. Wynn, the attorney representing the defendant in this case? [39]

A. I didn't consult with them. We just had a verbal conversation there in the morning.

Mr. Wynn: I will stipulate that on several occasions I have discussed the testimony of Mr. Burton with him.

Q. (By Mr. McCormick): Now, Mr. Burton, did the Southern California Edison Company, the defendant in this case, notify you of this suit shortly after the filing of the suit?

A. No.

Q. When did you first learn of this suit being on file in this court?

(Testimony of George E. Burton.)

A. It was along in June, I believe.

Q. Of what year? A. This year.

Q. And did you receive any notification from the defendant company making demand upon you to defend this suit?

Mr. Wynn: I object to that, if your Honor please. That is incompetent, irrelevant and immaterial; it is not proper cross-examination. Whether a demand was made on the witness has nothing whatever to do with this testimony.

The Court: Overruled. You may answer.

A. Well, I went down to see Mr. Weeks. I don't remember now who I got the first letter from. And he in turn corresponded with Catlin & Catlin.

Q. (By Mr. McCormick): Mr. Weeks is the attorney that [40] represented you in the case of Burton versus Hurley tried in the Kansas court?

A. Yes, sir.

Q. Did you receive any letters direct from the Southern California Edison Company's attorneys or Southern California Edison Company or their attorneys? A. No, sir.

Q. After consulting with Mr. Weeks concerning this letter that you say was received by him, what then did you do?

A. Well, he corresponded with Catlin & Catlin, attorneys out here.

Q. Have you consulted with Mr. Catlin while you were in California?

A. I was in his office one day for about——

Q. Well, does Mr. Catlin represent you or has

(Testimony of George E. Burton.)

he represented you and advised you with respect to this suit?      A. He has represented me.

Q. Is he now representing you?

A. No, sir.

Q. Has Mr. Catlin been here at the counsel table each day this trial has been in progress up until this morning?      A. Yes, sir.

Q. And he was here at your request? [41]

A. Well, it was the suggestion of Mr. Weeks.

Mr. McCormick: I ask the answer be stricken out.      A. At my request; yes, sir.

Mr. McCormick: As not responsive.

Mr. Wynn: The witness has said by his request.

The Court: Motion denied. He said he believed it was the suggestion of Mr. Weeks at his request.

Q. (By Mr. McCormick): Did you make any request of him since arriving here to appear in this court?      A. No, sir.

Q. Now, do you say that you received or that you did not receive, whether it was through your attorneys or personally, a demand on the part of Southern California Edison Company to appear and defend this case?

A. I did not have any—I did not receive anything from the Southern California Edison Company.

Q. Did you receive anything through your attorney, Mr. Weeks?      A. No, sir.

Q. So your testimony is that no demand has been made on you to appear and defend this case?

A. No, sir.

(Testimony of George E. Burton.)

Q. State whether or not that you feel that you have an interest in this case?

A. Well, I—a personal interest, I think I have in [42] a way.

Q. Is it because of that personal interest that you are here at the present time?

A. No, sir. I am on my way to visit a sister-in-law in Hanford.

Q. Hanford, California? A. Yes, sir.

Q. And you merely stopped in here during the course of your trip? A. Yes, sir.

Q. Weren't you notified of the time to be here in order to participate in the trial?

A. Yes. I got that information from Mr. Weeks and subsequently made my plan on this trip accordingly.

Q. Now, Mr. Burton, I believe you have stated on direct that William Price died January 5, 1929?

A. I did; yes, sir.

Q. You were in California with your mother at the time of the death of William Price, were you not?

A. I was here. I was at his bedside when he passed on.

Q. And after the death of William Price, I believe you stated that there was a funeral held here in California or in Los Angeles for Mr. Price?

A. It was at Long Beach. [43]

Q. Long Beach? A. Yes, sir.

Q. All right. And that was on the 7th day of January, 1929? A. I believe it was the 7th.



(Testimony of George E. Burton.)

Q. Now, when did you leave Los Angeles to return to Kansas City, Missouri?

A. The 14th of January.

Q. And you arrived in Kansas City, Missouri, on what date?      A. The 17th.

Q. And in 1929?      A. Yes, sir.

Q. What hour of the day?

A. I don't remember the hour. It was in the morning.

Q. Tell the court, if you will, why you remained in California before return to Kansas City with the remains of Mr. Price for a period of seven days following the funeral held here.

A. Well, it was mother's suggestion. She had certain things to look after before she went back.

Q. Had business to transact?

A. I presume so; yes, sir, closing the house.

Q. You were reasonably well informed with respect to your mother's business and affairs, were you? [44]      A. No, sir; not entirely.

Q. Was it your desire to be of assistance or aid her in handling or discharging any business obligation that she had?

A. Naturally, I would be interested.

Q. Well, did she discuss then her business affairs with you at that time?

A. Not all of them; no, sir.

Q. Well, did she discuss any of them?

A. Well, she discussed things pertaining to the funeral and arrangements in Kansas City and such as that.

(Testimony of George E. Burton.)

Q. Discuss with you her property, her property assets?      A. No, sir.

Q. Or property holdings?      A. No, sir.

Q. Did your mother have a safety deposit box in Los Angeles?

A. I am not positive whether it was in both their names, but I have an idea it was.

Q. Well, was there such a deposit box that you at any time have knowledge of the fact of it being used by your mother?

A. Mr. Price took me to the vault and pointed up and says, "There's our box up there. You might at some time have occasion to want to know where it is." [45]

Q. Now, Mr. Burton, didn't your mother point out this box to you?

A. Mr. Price is the one that pointed it out.

Q. Well, did she at any time ever point it out?

A. No, sir.

Q. She did not?      A. No.

Q. Did you go to the safety deposit company with your mother before leaving for Kansas City, Missouri, after the death of William Price?

A. Yes, sir.

Q. All right. Did you then see that she entered a safety deposit box?      A. I did.

Q. And what did she remove from the safety deposit box, if you know?

A. Well, what papers she had in there.

Q. Did she remove any stock of the Southern California Edison Company?

(Testimony of George E. Burton.)

A. The stock was in the safety deposit box and was removed.

Q. All right. Did she remove the 575 shares of stock represented here by Plaintiff's Exhibits 1 to 7?

A. She removed all papers that was in that box.

Q. Including that stock? [46] A. Yes, sir.

Q. Now, what did she do with that after she removed it, the stock?

A. Well, I don't remember whether it was the same day or a few days after, she went to the Southern California Edison Company and——

Q. Did you go with her? A. I did.

Q. Who did you see at the Southern California Edison Company? A. Mr. Greenhouse.

Q. You saw Mr. Greenhouse in the presence of your mother? A. I did.

Q. What did your mother say to Mr. Greenhouse or what did Mr. Greenhouse say to her?

A. I don't know the exact conversation.

Q. Give us, to the best of your recollection, the substance of that conversation.

A. Well, she had some conversation in regard to the stock.

Q. Well, what was it?

A. I don't know word for word.

Q. I told you that I would be satisfied with the substance of it. [47]

A. Well, it was in regard to the transfer of the stock. She claimed that Hurley's name should not be on there.

(Testimony of George E. Burton.)

Q. And you went to the Southern California Edison Company for the purpose of endeavoring to ascertain whether his name could be removed from that stock; was that the purpose of it?

A. I presume.

Mr. Wynn: I object to the question—if you make it clear whether it is his purpose or the purpose of Mrs. Price in your question——

Mr. McCormick: The purpose of Mrs. Price and his purpose as well.

The Witness: I presume it was mother's purpose. He wanted some information in regard to it.

Q. Did your mother tell you that that was a mistake or an error in regard to this stock?

A. She didn't tell me anything in regard to it.

Q. Didn't she tell you that it was an error for Lester Hurley's name to be included in this stock prior to the time that you went down to the Southern California Edison Company? A. No, sir.

Q. To see whether or not it could be transferred out of his name? [48] A. No, sir.

The Court: Did she get the assignment forms that are attached to Exhibits 1 to 7 from the Edison Company at that time?

The Witness: No; I don't believe they were given to mother at the time.

The Court: Were they at some later time?

The Witness: Do you mean for the dividends?

The Court: No. I am referring to the forms of assignment that are on the stock certificates.



(Testimony of George E. Burton.)

Mr. Wynn: May those be exhibited to the witness?

The Court: Yes.

Mr. Wynn: So it is clear.

The Court: Will you hand Exhibits 1 to 7 to the witness, Mr. Clerk?

The Witness: You mean this portion of it?

The Court: That part that you signed there.

The Witness: Yes; I think that mother—he gave those at the same time, but I am not positive. I was just there with her. Her conversation with Mr. Greenhouse was as it would happen in any office.

The Court: She was asking him how to get this stock?

The Witness: Yes, sir.

The Court: Out of Lester Hurley's name into her name and your name? [49]

The Witness: Yes.

The Court: He made some explanation to her, did he?

The Witness: Yes. As near as I can remember any conversation, he stated if she took that back to Kansas City and have the signatures attached and then return to him.

The Court: Did he give her the forms then?

The Witness: I am not positive whether they were handed at the time or whether it was handed later on.

Q. (By Mr. McCormick): Your deposition was

(Testimony of George E. Burton.)

taken, Mr. Burton, on September 16, 1944, in the case of Burton versus Hurley and Southern California Edison Company, was it not?

A. Yes, sir.

The Court: That is the Kansas court action?

Mr. McCormick: Yes, your Honor. By permission of the court, I would prefer to read the questions, if I may, to the witness without previously presenting them. I believe it will save some time if that is not unsatisfactory to the court.

The Court: Is there objection to that method?

Mr. Wynn: No. I have never seen the deposition and I would like to read it with you and look at it while you are reading.

Mr. McCormick:

“Q. You say you went with her to the Edison Company with certain certificates? [50]

“A. Yes.

“Q. For what purpose?

“A. Because his name was attached to it and she said it was an error.

“Q. She said it was an error? A. Yes.

“Q. Told you that it was an error?

“A. She told Mr. Greenhouse of the Southern California Edison Company it was.

“Q. And then what happened or what was done with the stock?

“A. Well, he advised her to take the stock and have it transferred and have Lester sign his name to it.”

(Testimony of George E. Burton.)

You so testified; those questions were asked and those answers given?      A. Yes, sir.

The Court: Was anything said about transferring the other 88 shares of common and the 191 shares of preferred out of Lester's name?

The Witness: No, sir.

The Court: Was that ever discussed?

The Witness: No, sir. Only mother—that stock was, I believe, in mother's name and she said that that was to be left to Lester and I, the 88 shares of common and the [51] 191 shares of preferred. That was the intentions and was his part of the transfers that was made.

The Court: Is that what she told you?

The Witness: Yes, sir.

Q. (By Mr. McCormick): I also ask you, Mr. Burton, as to whether these questions were asked you and these answers given:

“Q. Do you know in substance what the conversation was?

“A. Well, I knew she was there to get his advice on the transfer of the stock.”

Mr. Wynn: That, for the purpose of the record, is referring to a conversation between Mrs. Price and Mr. Greenhouse.

Mr. McCormick: And as between Mr. Burton and his mother.

Mr. Wynn: Yes. It is referring to the meeting at the Edison Company to which testimony has been previously directed.

Mr. McCormick: That is true.

(Testimony of George E. Burton.)

Mr. Wynn: It was not clear from the question.

Mr. McCormick:

“Q. And do you know what advice he gave her?

“A. No; only the advice that she had from Mr. Greenhouse that Southern California Edison Company [52] was to have this stock transferred back; that it was an error.

“Q. Now, in this connection I am going to ask you, Mr. Burton, just to relate all the conversation that you remember.”

I withdraw that question. It relates to another subject.

The Court: Did you so testify with respect to the questions and answers thus far read?

The Witness: Yes, sir.

Q. (By Mr. McCormick): Now, Mr. Burton, after receiving this advice from Mr. Greenhouse and giving to Mr. Greenhouse the information, as you say was given him, that this was an error and that Lester Hurley's name was in it improperly and should be removed, did you return to Kansas City with the stock then in the possession of your mother?

A. Mother had the stock in her possession. We left here on the 14th of January.

Q. After you arrived in Kansas City it was your purpose to endeavor to secure the transfer of these shares out of the name of Lester Hurley and into the name of yourself and your mother?



(Testimony of George E. Burton.)

A. That was mother's idea; yes, sir.

Q. And she so advised you?

A. Advised me? [53]

Q. Yes; informed you that that was her purpose and desire? A. Yes, sir.

Q. In pursuance of that purpose I will ask you to state if you got in communication with Mr. Hurley?

A. I did not myself. Mother had some arrangements with him.

Q. Now, do you know that she had some communications with him or do you just assume that that was the fact?

A. Well, she got in touch with him, I believe sent one of the boys over, one of the children over. I don't remember whether he had a phone at the time, but she made arrangements for him—in fact, I believe he was over when the train arrived.

Q. Do you know whether or not your mother made any arrangements with Mr. Hurley to meet her at any time relative to this stock, of your own knowledge?

A. I don't know of any conversation, but there was some arrangements made.

Q. Now, did you hear her call him?

A. I did not.

Q. Did you know of her sending any messenger or making any arrangements of any kind or character? A. No; I do not. [54]

Q. Then, you do not know how the arrangements, if any, were made?

(Testimony of George E. Burton.)

A. No; I don't know how they were made.

Q. Did you ever hear any discussion between your mother and Lester Hurley on any occasion relative to this stock? A. No, sir; I did not.

Q. Then, as to how, if it is a fact that Mr. Hurley at any time met you and your mother relative to the transfer of this stock, you do not know how it came about that he did so meet you?

A. I don't know just exactly any arrangements that was made between mother and he.

Q. Mr. Burton, did you at any time ever discuss with or mention to Mr. Hurley this stock represented by Plaintiff's Exhibits 1 to 7?

A. Do you mean prior to mother's death?

Q. Yes; prior to your mother's death.

A. No, sir.

Q. Now, Mr. Burton, I will ask you to state as to when you say that Mr. Hurley appeared at the Brotherhood State Bank, at which time you state that these assignments that appear attached to Exhibits 1 to 7—when did that occur?

A. As near as I can remember, I think the date was [55] on the 18th of January.

Q. Well, now, is that as nearly as you can remember? Do you have any recollection that that was the date?

A. The only recollection I have of it, that was when we were in the bank, but the date, I think, was the 18th.

Q. When did you first come to the conclusion that this transfer transpired on the 18th?

(Testimony of George E. Burton.)

A. Well, I have had plenty of time to think of it in the last two years.

Q. Prior to the former trial—the trial of this case, I should say, of Burton versus Hurley, you had considerable time in which to think of it then, didn't you?

A. Before it was brought to my attention at the trial is that?

Q. Yes; when the suit was filed, when you filed the suit concerning this stock.

A. There was plenty of time; there was about four months, I believe.

Q. You testified in that case that was tried in the District Court?

A. Yes, sir.

Q. And you gave your deposition to which I have already referred prior to the trial of that case on September 16, '44?

A. Yes, sir. [56]

Q. And then subsequent to that date you gave your deposition in the present case now before the court on trial on October 19, 1946?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. I believe you stated that you feel that this occurrence took place in the morning of the 18th?

A. Yes, sir.

Q. That is your present testimony, is it?

A. As near as I can remember; yes, sir.

Mr. McCormick:

“Q.” —

Mr. Wynn: From what page are you reading and what deposition?

(Testimony of George E. Burton.)

Mr. McCormick: 19, from the deposition as given in the case of Burton versus Hurley:

“Q. What time of day was this?

“A. I don’t remember the exact time. It was before 3:00 o’clock in the afternoon.

“Q. Was it in the morning or in the afternoon?

“A. I don’t remember the exact time.

“Q. You don’t know what time of day it was?           A. No.”

Those questions were asked you and those answers made?           A. Yes, sir. [57]

Q. Why are you any more certain now that it was in the morning than when you gave that testimony?

A. Well, mother was stopping at my place at the time and I remember after we got back from the bank we had dinner. We had our lunch at that time.

Q. Well, has that been a matter that you just found out? Didn’t you know that at the time you gave this deposition?

A. I had plenty of time to think recently, but I am not positive exactly the exact time. It might have been 1:00 or 2:00 o’clock before we had our lunch.

Q. Again, I ask if these questions were asked you and these answers given:

“Q. You gave us the date of the burial of William Price, I believe?

“A. 19th of January.



(Testimony of George E. Burton.)

“Q. 19th of January? A. Yes.

“Q. 1929? A. Yes.

“Q. Give us, if you will, the date upon which you say that Lester Hurley, Mrs. Price, and yourself met Mr. Alberti at the bank for the purpose of transferring this stock.

“A. Well, I didn't say the exact date, but it was [58] along in the latter part of January or the first part of February. I don't remember the exact date.

“Q. That is as near as you can come to it?

“A. Yes.

“Q. Do you have any memorandum or documents or anything to refresh your recollection that will give you the exact date? A. No.

“Q. You stated that it occurred after the burial of Mr. Price? A. It did.”

Q. Were those questions asked you and those answers given?

A. Yes; those questions were answered.

Q. Explain to the court why it is at the present day that you claim to have a recollection of this having occurred on the morning of the 18th of January, when you have previously definitely testified that it occurred after the burial of Mr. Price which occurred on the 19th of January, 1929?

A. Well, that is quite a number of years back to get it exact. Since I have had plenty of time to think this matter over recently, I can pretty near form the conclusion that it was on the 18th.

(Testimony of George E. Burton.)

Q. Your memory with respect to matters has gotten [59] better as time has elapsed?

A. It has in regard to this matter; yes, sir.

Mr. Wynn: Have you refreshed your recollection in any way?

The Witness: Well, there isn't any specific thing that I can think of that would remind me of the exact hour, but I know at the time we got back to Kansas City mother was very anxious to have that matter taken care of.

Q. (By Mr. McCormick): Now, you spoke of having plenty of time to think this matter over. In the trial of the case of Burton versus Hurley, I will ask you if this question was asked you and this answer given:

Mr. Wynn: Now reading from a transcript of the trial?

Mr. McCormick: Yes; and I so designated.

“Q. As far as you now remember, you were there on this one occasion when you were all there together and signed these instruments?

“A. Yes, sir.

“Q. Was that during banking hours?

“A. Yes.

“Q. Was it in the morning or the afternoon?

“A. I do not know what time of day it was.”

Were those questions asked and those answers given? A. Yes, sir.

(Testimony of George E. Burton.)

Q. In the giving of your deposition on October 19, 1946, less than a month ago, I will ask you if these [60] questions were asked and these answers given:

“Q. And from the time the matter was first taken up with Mr. Alberti, how long a period of time elapsed, to the best of your knowledge, until an effort was made to secure the endorsement or the assignment of this stock?

“A. Well, it was only a few days.

“Q. A few days. Now, Mr. Burton, was the stock, which in the former trial and the certificate numbers which I have read to you here identified as Exhibits ‘1’ to ‘7,’ were they taken down to Mr. Alberti by your mother and the endorsement made by yourself and Mrs. Price of these certificates? A. Yes.

“Q. Now at the time that this endorsement occurred on the assignment of stock and irrevocable power of attorney, who was present?

“A. Well, my wife was present, Lester was there, myself and mother.

“Q. And that was in the bank, the Brotherhood State Bank of Kansas City, Kansas?

“A. Yes.

“Q. Now did you all go down to the bank together, or did you go separately?

“A. I know my wife and my mother and I went [61] together, and I think we met Lester there.

(Testimony of George E. Burton.)

“Q. What time of day was that, if you recall? A. Well, it was in the morning.

“Q. And do you know what day it was?

“A. Not the exact date, no.

“Q. To the best of your recollection between what dates would you say that this action occurred?

“A. Well, it was right after we got back from California with Mr. Price’s body.

“Q. Well, how long afterwards?

“A. Well, I don’t recall.

“Q. Would you say that it occurred sometime between the 19th of January and the 19th of February, 1929?

“A. I would say sometime between the 17th of January.

“Mr. Stripp: And what?

“Q. 17th of January, 1929? A. Yes.

“Mr. Stripp: Between what and what?

“A. Well——

“Mr. Stripp: Can’t be between one date.

“A. No. Well, say between the 17th and 19th.

“Q. Between the 17th and 19th?

“A. Or the 17th and 20th, along in there. It was [62] right shortly after we returned from California.

“Q. I will ask you to state, Mr. Burton, whether or not these questions were asked you and these answers given, on page 163 of the transcript of the testimony given in the United



(Testimony of George E. Burton.)

States District Court of Kansas City, Kansas:

“ ‘Question: And you accompanied your mother in bringing the body back?

“ ‘Answer: I did.

“ ‘Question: I think you said he was buried on the 19th of January?

“ ‘Answer: Yes.

“ ‘Question: These certificates on this occasion in the bank you referred to then occurred between January 19th and February 19, 1929?

“ ‘Answer: They did.’ ”

Those questions were asked you and those answers given?

Mr. Wynn: In both the deposition and in the transcript?

Mr. McCormick: In both the deposition and in the transcript?

A. Yes, sir.

“Q. It is your desire now to say that your best recollection is that it occurred between the 17th and 19th or 20th of January, 1929?

“A. Well, no, it might have been [63] later on.

“Q. I see.

“A. But it was from the time we got back, and, oh, in—well, I would say a week or two.”

Those questions were asked and those answers given? A. Yes, sir.

Q. Explain, if you can, to the court as to how your memory has even gotten so much better with

(Testimony of George E. Burton.)

respect to this matter from the 19th day of October up to the present time.       A. Of this year?

Q. Of this year, yes.

A. Well, as I say, there has been so much come up before me that gives me a chance to think these matters over.

Q. You had all the time that has elapsed during any of this time, except the period of time from the 19th up to the present time, haven't you?

A. Well, I have had a lot of time to think of it in that time; yes, sir.

Q. Mr. Burton, after the trial of the case of Burton versus Hurley and the decision rendered in that case did you read the opinion of the court?

A. No, sir; I did not all of it. I read some of it.

Q. You read some of it?       A. Yes, sir.

Q. It was not of sufficient interest to you to read it all? [64]

A. I didn't have it in my possession to read it all.

Q. I will ask you to state, Mr. Burton, whether you read this portion of the opinion:

“\* \* \* These seven instruments are undated but show they were received by Edison at Los Angeles on three different dates, viz., Jan. 22 a.m., Feb. 1 a.m., and Feb. 18 p.m., all in 1929.”

Mr. Wynn: Pardon me. That is referring to these instruments now before the witness?

Mr. McCormick: That is right; Exhibits 1 to 7.

“The issue of the six certificates of stock

(Testimony of George E. Burton.)

under authority of these instruments was made on February 19, 1929."

Now, did you read that portion of the opinion?

A. No, sir; I did not.

Q. Were you ever advised as to the contents of this opinion by your attorney? A. No, sir.

Q. Is it a fact, Mr. Burton, that the occasion or real reason for your variation in your testimony in the fixing of this date, as you now claim that you have it fixed in your mind as of January 18th, is because it was shown by the receiving dates of these certificates that it could not have been signed at the time that you have previously testified that they were signed? [65]

Mr. Wynn: In other words, did that refresh your recollection?

Mr. McCormick: No. I am not asking for recollection.

Q. I am asking if that is not the reason why you changed your testimony, that you have learned now from the former proceeding that your dates so fixed in the best of your recollection as you then gave it was an impossible date as far as this signature, genuine signature of Lester Hurley being attached to the instruments?

A. Well, that date of receiving by the Edison Company, I knew it could not have been in February when it was received before the 1st of February.

Q. You seem to have overlooked some of the dates that appear upon those instruments. I will

(Testimony of George E. Burton.)

call your attention specifically to them: Received January 22, a.m., received February 1, a.m., received February 18, a.m. Now, you will notice that the first date upon which these instruments were received was January 22, a.m., 1929.

A. Yes, sir.

Q. Now, the funeral occurred on the 19th?

A. That is correct.

Q. That was Saturday? A. Yes, sir.

Q. And you say it was 2:30 o'clock in the afternoon? A. Yes, sir. [66]

Q. The next day was Sunday?

A. Correct.

Q. Monday would have been the first date, would it not, at which this matter could have been transacted in the bank following the 19th?

A. That is correct.

Q. So that, having that fact, from that fact from your former understanding, do you now desire to tell the court that you are all wrong and that your testimony given in all of these depositions on three different occasions in which you fixed the time, and as close as you could, between January 19th and February 19th is to be disregarded and that you now know the time at which these instruments were signed?

A. Well, I have come to the conclusion that it was before the 22nd of January, from what information I gathered now on these certificates.

Q. Now, Mr. Burton, your mother had been



(Testimony of George E. Burton.)

married to Mr. Price for a number of years, had she not?

A. They were married in 1916.

Q. Did they maintain a harmonious relationship during their married life? A. They did.

Q. Did you have a high regard for William Price? A. I sure did. [67]

Q. And from what you observed did your mother have a high regard for him? A. She did.

Q. Was your mother grieving and very much disturbed by reason of the passing of William Price?

A. At the beginning she was; yes, sir.

Q. At the beginning. Well, what do you mean by the "beginning"; how long did it last?

A. Well, she cried and took on very like most persons do in a bereavement of that kind.

Q. Was she still grieving about the situation at the time that the body was returned to Kansas City for burial?

A. Well, not as much as she did at first.

Q. Not as much? A. No.

Q. You, I suppose, endeavored to comfort your mother? A. I did.

Q. And you were with her practically all the time after she arrived in Kansas City, were you?

A. Well, no; not all the time I was not.

Q. Well, a great deal of the time?

A. Well, she stayed at my home there for over a month, I think until March.

(Testimony of George E. Burton.)

Q. Now, you want to tell the court that before this husband that has just departed, just shortly prior departed [68] this life, was buried that you and your mother went down to the bank and took action with respect to the transferring of the property that was really received and secured from him before he was laid away in his grave, is that right?

A. That is true.

Q. Now, will you state, Mr. Burton, whether or not any communication was made between yourself and your mother or either one of you and Mr. Alberti of the Brotherhood State Bank before you returned to Kansas City on the 17th of January?

A. I believe that I did write Mr. Alberti a letter telling of Mr. Price's death. I am not positive.

Q. Did you mention anything with respect to the fact that you had found stock in the name of Lester Hurley and ask for his advice?

A. No, sir.

Q. How long had you known Mr. Alberti?

A. Oh, I guess I had known him for 35 years.

Q. A very good friend of his?

A. Well, he was a neighbor of my first wife's mother, living across the street.

Q. Well, did you consider him a good friend?

A. In the early part I just knew him. He was a good friend of mine later on, because I done banking at the Brotherhood State Bank for a good many years before Mr. [69] Price's death.

Q. So you were well acquainted?

A. I was well acquainted with him.

(Testimony of George E. Burton.)

Q. Now, when your mother got back to Kansas City in your company, returning the body of William Price for burial on the 17th, did she communicate with Mr. Alberti about this matter?

A. Yes, sir.

Q. And when did she first communicate with him?

A. I think it was the next day, or the day that we arrived in Kansas City with the body.

Q. You think she went right down then to see Mr. Alberti?

A. It is only about three blocks from where we reside.

Q. Well, did you go with her?

A. I don't remember that I went with her; no, sir.

Q. So you don't know except from your general recollection as to whether she went or not, but you think she did?

A. I think she did; yes, sir.

Q. So she was there the very first day that she returned to Kansas City to consult with Mr. Alberti?

A. I don't know whether it was the first day or the second day, or whether a conversation over the phone or not. At that time, why, naturally, making the funeral arrangements and all, we were pretty busy. [70]

Q. You had some considerable matters in that regard to take care of, didn't you?

A. I certainly did; yes, sir.



(Testimony of George E. Burton.)

Q. And your mother was interested in those arrangements, I take it?

A. Yes; but she left it up to me in regard to seeing the undertaker and so forth.

Q. It is your best recollection, however, that she saw Mr. Alberti on one occasion or communicated with him before you went down to the bank altogether, as you stated?

A. No; I don't know exactly whether she had any communication with him. She might have talked to him on the phone or she might have went down.

Q. Well, do you have any knowledge or information as to whether she did or not?

A. No; I have not.

The Court: We will take the morning recess at this time. Five minutes.

(Short recess.)

Q. (By Mr. McCormick): Mr. Burton, I will further ask you as to whether these questions were asked and these answers given in your deposition of September 16, 1944.

“Q. Did you talk with Mrs. Price, your mother, concerning this supposed error that existed?

“A. I don't remember any conversation but she [71] wanted to know what to do and I advised her to go down and see Mr. Alberti at the Brotherhood Bank.

“Q. Did she tell you anything about the



(Testimony of George E. Burton.)

nature of the occasion for the error that you say existed?

“A. She didn’t say any occasion. She said it was an error and his name was not supposed to be on there.

“Q. What, if anything, did you say to your mother when she said it was an error? What advice did you give her?

“A. Well”——

Mr. Wynn: Mr. McCormick, “if any”?

Mr. McCormick: “If any”?

“A. Well, after she had been told by Mr. Greenhouse to have Lester sign that stock back because of the transfer that would be—was made, and it would be on the books of the company, and I advised her to go to see Mr. Alberti in the Brotherhood State Bank.

“Q. Did she go to see Mr. Alberti at the Brotherhood State Bank?      A. She did.

“Q. And when was that?

“A. I don’t remember the exact date but it was along between the 20th of January and the 1st of March.” [72]

Q. Those questions were asked and those answers were given?      A. Yes, sir.

Q. These further questions:

“And you were with her at that time?

“A. I don’t remember whether I was with her the first time but I was with her at one time after.

(Testimony of George E. Burton.)

“Q. And did you hear the conversation between Mrs. Price and Mr. Alberti?

“A. Well, I was just in there. I don’t remember the exact words that was said or how the conversation went.

“Q. Do you know in substance what the conversation was?

“A. Well, I know she was there to get his advice on the tranfer of the stock.

“Q. And do you know what advice he gave her?

“A. No; only the advice that she had had from Mr. Greenhouse of the Southern California Edison Company was to have the stock transferred back; that it was an error.

“Q. Now, in this connection I am going to ask you, Mr. Burton, just to relate all the conversation that you remember with Alberti or in your presence between Alberti and Mrs. Price at this occasion or [73] any other occasion.

“A. Well, I don’t remember the exact language or conversation passed between them.

“Q. Can you give the substance of the conversation?

“A. It was in regard to the transfer of stock.

“Q. All right. What was said, what was done?

(Testimony of George E. Burton.)

“A. I don’t know. I don’t remember what was said.

“Q. What was the substance of what was said?

“A. Well, it was the advice she had been given by Mr. Greenhouse to transfer the stock back; it had been in error.

“Q. Didn’t she tell him what the nature of the error was?

“A. I suppose she did.

“Q. But you don’t recall anything about that?

“A. I don’t recall what was said.

“Q. What was Mr. Alberti stating? What did he say?

“A. I don’t remember his statement.

“Q. You don’t remember the substance of his statement, either, is that right?

“A. I don’t remember the substance. I don’t remember any substance only it was in regard to the stock, that is all. [74]

“Q. Just a discussion, but you don’t remember what the discussion was?

“A. Well, I knew the question was of the transferring of the stock back.

“Q. Now, what was done there at that time, if anything?

“A. Well, there was my wife and my mother, Lester and myself, we all signed that stock.

(Testimony of George E. Burton.)

“Q. Well, that was at this occasion when you say that you first went to see Mr. Alberti?

“A. I don’t remember whether it was the first time we went to see him, but it was when we all got together.

“Q. Well, now, I am confining you to this first occasion when your mother, you say, went to see Mr. Alberti and you went along. Mr. Hurley was not there with you at that time, was he?

“A. I didn’t say I was with her the first time she went. She might have been there before me.

“Q. Well, anyway”——

Mr. Wynn: “Before without me”?

Mr. McCormick: “Without me.” I beg your pardon.

“Q. Well, anyway, you were with her at one time?

“A. At one time I was; yes.

“Q. That was the early part of ’29? [75]

“A. It was.

“Q. At this occasion that you went with her who else was along?

“A. Well, the only time I was there, there was Lester and my wife and my mother and myself.

“Q. And was that the time when she said to Mr. Alberti that there was an error in the stock?



(Testimony of George E. Burton.)

“A. I don’t know. She had been there before.

“Q. She had been there before?

“A. She had probably been there before and talked the matter over with him.

“Q. But you were not with her that you remember when she was there before?

“A. No.

“Q. Now, you say that upon the occasion which you remember of being there other parties were with you. Who else, what were these other parties?

“A. Well, there was my deceased wife and my mother and Lester Hurley.

“Q. What was her name?

“A. Her name was Cecelia Burton.

“Q. Who else?

“A. My mother, Mrs. E. J. Price, Lester Hurley, and myself.

“Q. Anybody else that was there present at the [76] time of this occurrence that you are now referring to?”

Mr. Wynn: “No, sir. Might have been a stenographer.

Mr. McCormick: “No, sir; might have been a stenographer sitting on the side there or something.

“Q. Mr. Alberti was there?

“A. Yes.”

Those questions were asked and those answers given? A. Yes, sir.

Q. Continuing:

(Testimony of George E. Burton.)

“Q. Now, when Mrs. Price went in to see Mr. Alberti on this occasion what did she say to him?

“A. Well, I don’t remember just the exact words that was said. It was in regard to the signatures put on that stock.

“Q. Don’t you remember anything that was either said by her or said to her by any of the parties there?

“A. Well, she said, ‘Here, that is Lester and here is George.’

“Q. What time of day was this?

“A. I don’t remember the exact time. It was before 3:00 o’clock in the afternoon.

“Q. Was it in the morning or the afternoon?

“A. I don’t remember the exact time. I don’t know what time of day it was, no. [77]

“Q. Where was this? Where is the bank located?      A. 8th and Minnesota.

“Q. Now, in whose office did this occur?

“A. It occurred in the bank. Mr. Alberti’s desk is just inside of the door.

“Q. All right. Did you sit down when you went in?

“A. Well, we stood for a minute and then there was seats provided.

“Q. And where were you sitting, by this desk?

“A. We were all there together.

(Testimony of George E. Burton.)

"Q. Were you seated or were you standing?

"A. Yes, we were seated.

"Q. And who produced the stock?

"A. Mother had it in her possession.

"Q. What did she do with it?

"A. Well, she put it down on the desk there.

"Q. Gave it to Mr. Alberti?

"A. She did.

"Q. And what did Mr. Alberti do or say?

"A. Well, I don't know the exact words he said.

"Q. I am not asking for the exact words. If you can give the substance of it, it will be satisfactory.

"A. Well, it was there for them to be signed and we signed it. [78]

"Q. Well, what was said to Mr. Hurley, any statement made by anybody?

"A. Well, I suppose he just said, 'Here, Lester,' and he signed his name to it.

"Q. Who signed first?

"A. Well, I don't know exactly; I think that Mother did.

"Q. Do you know who signed next?

"A. Well, it might have been me; I think it was.

"Q. And then Mr. Hurley signed last?

"A. Yes.

"Q. Now, did you all use the same pen?

(Testimony of George E. Burton.)

“A. Well, I am not positive about it, but I believe we did.

“Q. Now, who witnessed your signature?

“A. Well, I think Mr. Alberti witnessed them all.

“Q. You think he witnessed all of the signatures?

“A. My wife was there, too. She witnessed some of them, I think. I am not positive.

“Q. You know, I suppose, that there are certain parts of this assignment which you signed that was in typewritten form?

“A. What?

“Q. There was a part of this assignment on the back of these certificates that was filled with [79] typewritten form? A. Yes.

“Q. Was that filled in before you signed?

“A. It was.

“Q. And it was before any one of you signed? A. I presume it was; yes.

“Q. Well, do you know?

“A. Well, I am positive it was.

“Q. Who filled that in, that is, the typewritten portion?

“A. The stenographer there, I presume.

“Q. Well, did you see her?

“A. Well, she had a typewriter there.

“Q. It had not been done before you got there? A. No.

“Q. And it was not done afterwards, after the signing occurred?



(Testimony of George E. Burton.)

“A. Not that I know of. It was on there when we signed it.

“Q. On there when you signed it. What other documents, if any, were signed there that day by either you or your mother or Mr. Hurley?

“A. There was none that I know of.

“Q. Was there any other stock transferred that day or signed by you or Mrs. Price on that particular [80] day that Mr. Hurley is supposed to have signed this stock?

“A. No.

“Q. Who made the arrangements, if you know, for Lester Hurley to go to have this stock signed?

“A. Well, I don't know. Mother made the arrangements sometime.

“Q. Did you ever talk to him about the stock?      A. No.

“Q. Did you see Lester Hurley frequently between, we will say, November of 1928 and March of 1929?

“A. Well, I think he attended Mr. Price's funeral and was one of the pallbearers.

“Q. And how many times would you say that you saw him during that period?

“A. Well, I don't suppose over once or twice.”

Q. Were those questions asked and those answers given?      A. They were.

(Testimony of George E. Burton.)

“Q. Did you talk to him at all about this stock, about the transferring of it?

“A. No. That was matters of business. I didn’t handle it.

“Q. You never mentioned it to him?

“A. I don’t remember ever mentioning it to him; no.” [81]

Those questions were asked and those answers given?      A. Yes, sir.

Q. Now, Mr. Burton, you have testified on direct examination that Mr. Hurley signed these seven assignments and irrevocable powers of attorney in the Brotherhood State Bank?      A. Yes, sir.

Q. And you say that he signed dividend order 12742, Plaintiff’s Exhibit——

Mr. Wynn: 10.

Q. (By Mr. McCormick): ——Plaintiff’s Exhibit 10, I believe, at your residence, is that right?

A. At 1046 Ann Avenue, Kansas City, Kansas.

Q. And Plaintiff’s Exhibit 13 at the Union Station?      A. Yes, sir.

Q. In Kansas City, Missouri?

A. Yes, sir.

Q. Now, Mr. Burton, in view of your testimony that you had only seen Lester Hurley twice, once or twice from November of 1928 to March 1st of 1929, explain to the court how these various instruments were signed on these separate occasions, if that is true.

A. Well, now, I said once or twice. He was a

(Testimony of George E. Burton.)

nephew and with the children quite a number of times and visited the house. Now, I might not have seen him. He might [82] have been there when I was not at home, and I can't recall only once or twice that we were at the bank together. That is what I had reference to, but as far as——

Q. You did see him the day of the funeral, didn't you?      A. Yes. [83]

\* \* \*

Q. Well, you did give attention to this dividend order No. 12743, Plaintiff's Exhibit No. 13, since this controversy arose in 1944, didn't you?

A. The question again, please?

Q. Did you give attention to this dividend order or make any effort to secure either the original or a copy of it?      A. No.

Q. Oh, you didn't?      A. No, sir.

Q. When was the first time you saw either the original or a copy of the Plaintiff's Exhibit 13?

A. Was it introduced in the other trial?

Q. Well, do you know? [84]

A. No; I do not.

Mr. Wynn: I will stipulate that it was not introduced on the other trial.

Mr. McCormick: That is correct; it was not introduced in the other trial.

Mr. Wynn: It was not involved in the other trial.

Q. (By Mr. McCormick): However, at the time of the former trial you knew this dividend

(Testimony of George E. Burton.)

order had been signed or you claimed it was signed, didn't you?

A. I remember the order was sent to me by Mother to be signed but I had not signed it.

Q. And you also remember or claim to remember that the former dividend order No. 10, Plaintiff's Exhibit 10, was sent to you also, do you not?

A. Yes, sir.

Q. Do you mean to say that you didn't have any recollection until you saw this dividend order, Plaintiff's Exhibit 13, as to who witnessed it until after you saw the dividend order?

A. I didn't remember. I knew that Helen had signed one and I remember that we had got one of the red caps at the depot, but I couldn't recall just exactly who it was at the time.

Q. Did you try to refresh your recollection or ascertain anything with respect to the matter either through [85] your attorneys or yourself?

A. No, sir.

Mr. Wynn: When, when?

Q. During this period of the controversy, from the time the first suit was filed in the District Court of Kansas.

Mr. Wynn: Now, with reference to Exhibit 13 or 10?

Mr. McCormick: With respect to Exhibit 13.

A. I didn't inquire or make any inquiries at all.

Q. When you received these dividend orders, Plaintiff's Exhibit 10 and Plaintiff's Exhibit 13, from your mother did you read them?



(Testimony of George E. Burton.)

A. I don't think I read everything that was on there; no, sir.

Q. Well, did you read them at all?

A. I did.

Q. Did you feel you had any interest in this matter?

A. The letter that my mother wrote to me explained and said, "Have Less sign these and you sign them and return them to me. That will be my income."

Q. Now, I am asking you, however, if you had any interest in this matter, felt that you had any personal interest or desire to know anything about it?

A. Well, I had a personal interest in it to know that my mother was going to be provided for. [86]

Q. And yet do you desire to tell the court that, having received an instrument of this character, you did not read it in its entirety?

A. I read all of those names here, yes; I read that part of it.

Q. Each of them?

A. Yes, sir. [87]

\* \* \*

Q. In this deposition taken on September 14, '44, I will ask you to state whether this question was asked you—these questions asked you and these answers made.

"Q. To clear up the record, Mr. Burton, I want you to state whether or not you learned of the existence of these 575 shares of stock

(Testimony of George E. Burton.)

that was issued in the names of Burton, Price and Hurley before or after the death of William Price?

“A. It was after the death before I knew anything about it.

“Q. I will ask you this, Mr. Burton: State whether or not you knew of any stock having been issued in the name of Price, Burton and Hurley prior to the death of William Price?

“A. I did not.” [89]

\* \* \*

Mr. McCormick: Yes; did you so testify, Mr. Burton?      A. Yes, sir. [90]

\* \* \*

Q. Now, Mr. Burton, I direct your attention to the endorsement appearing upon each of the Plaintiff's Exhibits from 1 to 7, inclusive, and ask you to note if you observe that there are two separate, distinct guarantees of signatures appearing thereon, one of which guarantees the signature of George E. Burton and Elizabeth J. Price, and the other guarantees the signature of Lester Hurley? Now, do you know why there were two separate guarantees placed on those instruments?

A. No; I don't knew of any reason why, with the exception that those instruments were sent to the California Edison Company without the signatures being guaranteed, with only my wife's signature being on there as witnessing the signatures.

(Testimony of George E. Burton.)

Q. All the signatures were on there and placed on there, I believe you say, upon this one occasion when you were [93] at the bank?

A. Yes, sir.

Q. They were all put on there at that time?

A. Yes, sir.

Q. And were they all placed on there in the presence of Mr. Alberti?

Mr. Wynn: Now, by "all of the signatures" are you referring to all three of the Alberti signatures?

Mr. McCormick: I am referring to the assignors, all three signatures, all three signatures "Elizabeth J. Price," "George E. Burton," and "Lester Hurley."

Q. They were put on practically simultaneously, weren't they? A. They were; yes, sir.

Q. And in the presence of Mr. Alberti?

A. Mr. Alberti was there, my wife, my mother, and Mr. Burton.

Q. All right. Now, the signatures being on the instrument, do you know why that there was any occasion or reason for two separate and distinct guarantees of the two signatures in the one case, and a guarantee of the other signature in the other case? A. I know of no reason. [94]

\* \* \*

The Court: It is covered by your pre-trial stipulation. You admit that statement. The documents were sent to the defendant without any signatures guaranteed at all in the first instance.

(Testimony of George E. Burton.)

Mr. McCormick: That is true. [95]

The Court: Then the defendant sent them back, and then this man's name of the Brotherhood State Bank—what is it?

Mr. Wynn: Alberti.

Mr. McCormick: Alberti.

The Court: —Alberti guaranteed the Burton and Price signatures, and then they sent them back to the defendant, the defendant returned them to the bank, and then the guarantee of the Hurley signature was inserted there. That is what the pre-trial stipulation says, as I read it.

Mr. McCormick: That is true, your Honor; and what I am trying to bring out at this time in this connection is that Mr. Alberti, at the time that you were at the bank, state whether or not he was requested by either yourself or Mrs. Price at that time to guarantee these signatures.

A. No; there wasn't any question. Mr. Alberti had my signature there because I was banking with the Brotherhood State Bank.

Q. Now, in fact wasn't your purpose and endeavor and desire, from the statements or information given you by your mother, to endeavor to obtain the transfer of this stock without having these signatures guaranteed at all; wasn't that right?

A. No, sir.

Q. But you have no explanation as to why they were [96] guaranteed in the separate manner in which they appear from the instruments?

A. No, I haven't.



(Testimony of George E. Burton.)

Q. What, if any, consideration, Mr. Burton, did you ever pay to Lester Hurley for making this purported assignment?

A. I never. I never gave him anything. The only thing that I gave him was a \$5.00 check for a Christmas present.

Q. Do you know of any consideration, benefit of any kind or character that Lester Hurley ever received either from you or from your mother or any source as consideration for this transfer?

The Court: You mean for executing any of these documents?

Mr. McCormick: That is right.

The Court: Dividend orders or the assignments of stock?

Mr. McCormick: That is right, your Honor. That is what I want.

A. For any purpose, not for gift or anything?

The Court: Counsel is asking you whether you know of anything at all of value or any consideration whatever either given or promised to Lester Hurley for signing the assignments on Exhibits 1 to 7 or for signing the dividend orders, [97] Exhibits 10 and 13?

A. No; I know of nothing. [98]

\* \* \*

Wednesday, November 3, 1948—10:00 A.M.

Mr. Wynn: I will call Mr. Greenhouse.

FRANK L. GREENHOUSE

called as a witness by defendant, being first sworn,  
was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Frank L. Greenhouse.

Direct Examination

By Mr. Wynn:

Q. Mr. Greenhouse, what is your business or occupation?

A. Well, I am on compensation now from the Southern California Edison Company.

Q. You have previously been employed by the Southern California Edison Company?

A. Yes, sir.

Q. In what capacity?

A. Well, for the last 18 or 20 years as manager of the investment department.

Q. And you were manager of the investment department, then, in the latter part of 1928 and during 1929? A. That is right.

Q. In that capacity did you ever have occasion to meet a Mrs. Elizabeth J. Price?

A. Yes, sir. [2\*]

Q. And did you meet her husband, Mr. William Price? A. Yes, sir.

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Frank L. Greenhouse.)

Q. Did you ever meet Mr. George E. Burton?

A. Yes, sir.

Q. When did you first meet any of those individuals?

A. Mr. and Mrs. Price, I met them first, as I remember it, in 1924 when they came in to purchase some Edison stock, and they came in at various times after that down through the years.

Q. They were stockholders, then, in the Edison Company in the fall of 1928, were they?

A. Yes, sir.

Q. To your knowledge?                      A. Yes, sir.

Q. Did you have any meeting with Mr. and Mrs. Price and with Mr. Burton in the fall of 1928?

A. Yes, sir.

Q. Approximately when did that occur?

A. It was in November of 1928, around November the 19th.

Q. Where did that meeting take place?

A. In my office in the Edison Building at Fifth and Grand.

Q. Who all was present?

A. Mr. and Mrs. Price and Mr. Burton and myself.

Q. Now, will you describe to the court what occurred at [3] that meeting as you now recall it?

A. Yes, sir. They came in and they introduced me to Mr. Burton, and they had a number of Edison stock certificates with them, and Mr. Price said that they had talked it over and decided that they wished to have this stock re-issued. And I said, "In

(Testimony of Frank L. Greenhouse.)

what title?" He said, "We want it issued in Mrs. Price and Mr. Burton and"—the fellow's name, let's see, what was that?

Q. Mr. Hurley?

A. "Hurley," yes; all three as joint tenants, and asked if that was possible. I said, "Yes." And I went into great detail with them for possibly 15 or 20 minutes as to the reasons for and against having it joint tenants. And Mr. Price—he was quite an elderly man, very nervous—he said, "Greenhouse," he says, "that is all right to explain all that, but I am a pretty sick man," he says. "All I want to know about is if we have this stock re-issued into the three names, I want to be sure that if anything happens my wife will always get the dividends from the stock."

I said, "Well, as long as the company continues to pay dividends, they will, but all three parties will have to sign a dividend order so the dividends are paid to Mrs. Price." And I explained very fully to them that if they sold or transferred the stock or changed the dividend order, of course, she might be out of luck. [4]

Mr. Price, that is, he said, "Oh, I am not worrying about that. She won't change the stock or the dividend orders." He says, "If you are certain that that is the way it should be, if they all sign a dividend order that she will get the dividends as long as they are paid," he said, "we will go ahead with it."

So I had one of the clerks come in from the



(Testimony of Frank L. Greenhouse.)

transfer division and they checked on the stock certificates and they gave Mr. Price a receipt for them, and I wrote up a dividend order and I said, "Now, all three of you will have to sign this dividend order." I wrote it up and the places were all there for them to sign. I said, "Now, you please get this back to us as soon as possible because when the first dividend is issued on the re-issued stock, we want to have it so as to go to Mrs. Price." And they took the dividend order with them and it was not mailed back to me but it was mailed back to the investment department of the company in a reasonable course of time, in a reasonable length of time, as I remember it. And that is all there was really to that story at that time.

Q. I hand you now, Mr. Greenhouse, Plaintiff's Exhibit No. 10 in evidence in this case and ask you to inspect the same.

A. Yes, that is the dividend order that I made up for them to take with them to get properly signed and returned to [5] the company.

Q. You made that up on the occasion of this meeting with the three persons you have now mentioned?

A. That is right; on November the 19th, 1928, when they turned the stock in.

Q. What portion, if any, of that document is in your handwriting?

A. I would say all of it except the three signatures and addresses, and a witness named "Helen

(Testimony of Frank L. Greenhouse.)

Burton'' of 1046 Ann Ave., K. C., Kans.'' All the rest of it is in my handwriting except the three signatures.

Q. When that was received again by the Edison Company did it come to your attention?

A. No, sir. It would come direct to the company to the investment department. It shows it was received by the company December the 11th. It has the regular stamp on it.

Q. You fixed the date of your meeting with the three persons as November 19, 1928. How did you determine that was the date?

A. Well, several methods, very easily. Of course, first of all, as I say, I knew Mr. and Mrs. Price for a number of years, and when he came in he was quite a sick man, very excitable, and it stands out in my mind how thoroughly I went into the advantages and disadvantages of joint tenancy, and so forth. Then I had the transfer girl come in to give [6] the receipts, also dated November the 19th and I made this appear on the 19th and remember doing it definitely, and apparently it was received back by the company on the 11th, but not by me. It apparently came in with hundreds of other mail on that day.

Q. My next question was going to be: On the document I note a stamp marked in the lower right-hand corner "Dec. 11, 1928," and I was going to ask you what that indicates, whether it indicates the receipt by the Edison Company or in filing or disposition of it.

(Testimony of Frank L. Greenhouse.)

A. Well, I would not be positive. I feel very certain that that is a small stamp put on by the transfer clerk immediately it is received. It is on all our dividend orders that I know of. So I think that is what it refers to, the date received by the Edison Company. And the stencil stamp on it also shows that it was classified on December the 11th and the "Stencil Cut" on December the 11th, and checked by several on December the 11th.

Q. Yes. Now, that stencil would mean what?

A. Ordinarily, I think that would refer possibly to a dividend order. This dividend order is filed and they cut a stencil showing the dividend order, how the checks are to be issued.

Q. And then that information is placed on a card or Addressograph?

A. An Addressograph. It is a permanent record. [7]

Q. So that thereafter dividends then are paid pursuant to that record made up?

A. Absolutely, yes, sir.

Q. Do you recall any other meeting or conversation with any of the persons mentioned, that is, Mr. or Mrs. Price or Mr. Burton with reference to the stock subject to that dividend order?

A. No. But during this first meeting, Mrs. Price spoke up and said she had some stock in her name. She wanted it put in this three joint tenancy title the same as the stock that they just brought in.

Q. She said that at this first meeting?



(Testimony of Frank L. Greenhouse.)

A. Yes, sir. And I said, "Well, have you got your stock certificates with you, Mrs. Price?" She said, "No, but I can get them within the next day or so." So she came in about three days later with all the rest of the stock that was in her name in some joint tenancy with Mr. Price, that really belonged to her, and they put all those issued in Mrs. Price and Burton and—what is his name?

Q. Hurley? A. —Hurley, yes.

Q. That occasion, you say, was a few days after the first meeting? A. Yes, sir.

Q. Did Mr. Price accompany her at that [9] time? A. Yes, sir.

Q. And did Mr. Burton accompany her?

A. Yes.

Q. Do you recall the number and type of shares that were involved in this second transfer?

A. I think in Mrs. Price's name there were probably 191 shares of Series B 6 per cent preferred stock and probably around 80 or 88 shares of the common stock.

Q. You have, of course, referred to the records of the company to refresh your recollection as to these amounts and the dates?

A. Yes, sometime ago.

Q. Where did that meeting occur?

A. In the investment department. You mean the second meeting?

Q. Yes.

A. Yes, in the investment department.



(Testimony of Frank L. Greenhouse.)

Q. Do you recall any conversation at that time relative to the dividends on this second block or lot of stock?

A. Yes. Yes.

Q. What was said and by whom?

A. They did not come into my private office on the second meeting. They asked for me—we were very, very busy—and I went out to the counter of the transfer division and one of the transfer clerks issued the receipt to them, and then [9] before they left I said, “Of course, now you will have to have a similar dividend order so that the dividends go to Mrs. Price that you took from me the other day.” So I wrote up another one for them and told them to please get it signed and return it as soon as possible.

Q. I hand you now Plaintiff’s Exhibit No. 13 in this action and ask you to inspect the same.

A. Yes. That is dated November the 22nd. That is the date we gave them the receipt for the 88 shares of common and 191 shares of Series B preferred; and that is all in my writing except the signatures and a witness here says “R. N. Jones, 3829 Garfield Ave., K. C. Mo.” All the rest of it is in my writing.

Q. And did you prepare that document in the presence of Mr. and Mrs. Price and Mr. Burton.

A. Yes, sir; right at the counter.

Q. To whom did you deliver it, if you recall?

A. The first one on November the 19th I delivered to Mr. Price, but the second one, when Mrs.

(Testimony of Frank L. Greenhouse.)

Price came in with hers, I delivered it to her as it happened.

Q. Although Mr. Price was present?

A. Oh, yes, sure; but we made the receipt to Mrs. Price because it was her stock being turned in the second time for transfer.

Q. Subsequently, the second dividend order, which is [10] Plaintiff's Exhibit No. 13 was returned to the Edison Company?

A. That is the November 22nd dividend order, yes, 12743, yes. That came back at the same time, apparently, December the 11th, as the other; so they probably took them on with them and went to Kansas City and got the third signature, and from there returned them by mail to us. You see, they are both the same, although this is dated November 19th and that is three days later.

Q. Yes, and the date "Dec. 11" is the stamped date you find in the lower right-hand corner of each dividend order?

A. That is right. That is right, and also on the stencil cutting.

Q. Now with reference to the stock——

The Witness: This is the stencil that they stamped on there and put the dates in.

The Court: Just a moment. Speak louder so the record will get what you are saying.

The Witness: Oh. This rubber stamp here shows——

The Court: That is to the right-hand side?

(Testimony of Frank L. Greenhouse.)

The Witness: To the right-hand side of the dividend order.

The Court: Referring to Exhibit 10.

The Witness: Yes. Shows that it was received on December the 12th (11th) and classified.

The Court: December the 11th, isn't it?

The Witness: December the 11th. Pardon [11] me.

The Court: And the stencil was cut by another clerk?

The Witness: On the same date and was checked by still another clerk on the same date; and that also ties in with the stamped date at the bottom right-hand corner on this particular dividend order.

The Court: Do I understand that you yourself wrote in the words——

The Witness: Yes, sir.

The Court: ——“Nov. 19th, 1928”?

The Witness: Yes, sir.

The Court: The name “Mrs. Elizabeth J. Price”?

The Witness: That is right.

The Court: And the name “Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley”?

The Witness: That is right.

The Court: And “(575 shares)”?

The Witness: Yes.

The Court: And all that appears in pen and ink on Exhibit 10 in the body of it?

The Witness: Yes, sir.

(Testimony of Frank L. Greenhouse.)

The Court: Did you write that on there prior to the time any signatures were placed on it?

The Witness: Yes, sir. And there the address for sending the dividends is in my handwriting.

The Court: You wrote that on at that [12] time?

The Witness: Yes, sir. And I gave that particular one to Mr. Price to be sure and have all three signatures on there and return to the company.

The Court: Is your testimony the same with respect to your handwriting as it appears on Exhibit 13?

The Witness: Yes, sir.

Mr. Wynn: I started to ask a question. How far, Mr. Bargion, did we get?

(Question read by the reporter as follows:

“Q. Now with reference to the stock——”)

Mr. Wynn: I will reframe the question, with the Court's permission. Referring to the stock which is the subject of Plaintiff's Exhibit No. 10 which you have before you, did you after the meeting which you have previously described have any conversation with any of the parties you met with the first time concerning that stock?

A. No, sir.

Q. Did it subsequently come to your attention that the 575 shares of stock covered by that dividend order had been actually transferred to Mrs. Price and Mr. Burton, alone, and was there a divi-



(Testimony of Frank L. Greenhouse.)

dend order prepared by you in connection therewith?

A. No. I didn't know a thing about the transfer into the two names you mention until some weeks or months after the thing had taken place, after the transaction had taken place. [13] It was handled apparently from Kansas City through regular mailing operations and handled by the transfer division as a routine matter. That is as far as the stock is concerned, I am talking now about stock certificates.

Q. I hand you now, Mr. Greenhouse, a document, dividend order form No. 13157, bearing in the lower right-hand corner stamped date "Mar. 18, 1929," purporting to be signed by Mrs. Elizabeth J. Price and George E. Burton and to be witnessed, apparently, by yourself and referring to some common stock. Upon inspecting that document can you recall the connection in which it was executed, if it was executed?

A. On this date in March of 1929.

Q. Do you know what stock that referred to?

A. No, I could not say definitely. It simply says "common" here, but apparently Mrs. Price either came in or phoned and said she wanted her checks to continue to come in the name of Elizabeth J. Price. And that is on stock that was then standing in the name of Mrs. Elizabeth J. Price and George E. Burton.

Q. Have you prior to appearing here in court

(Testimony of Frank L. Greenhouse.)

on this date inspected the records of the Edison Company to determine what stock, if any, stood in the names of George Burton and Mrs. Price at or about the time of this dividend order?

A. No, sir.

Q. Can you explain who prepared the dividend order? [14]

A. You are talking now about the one that has the date "Mar. 18, 1929"?

Q. Yes. A. This third one here?

Q. Yes.

A. That is my handwriting except the signatures.

Q. I notice the signature as a witness attached thereto. Is that your signature?

A. Yes, sir. That is just——

Q. Did those parties——

A. No. That was just guaranteeing Mrs. Price's signature.

Q. Then Mr. Burton did not appear before you at that time? A. No, sir. No.

Mr. McCormick: If the court please, it seems to me that this is really encumbering the record and I would object to this line of testimony for the reason that it has been stipulated that these dividends were paid and delivered to Elizabeth J. Price under and in pursuance of this dividend order, as well as under and in pursuance of 12743, which is a matter which is not in contest and there is no issue here at this time on which the matter has a bearing.

(Testimony of Frank L. Greenhouse.)

The Court: The defendant, I take it, is offering it for the purpose of showing the surrounding circumstances of the [15] defendant's dealings with Elizabeth J. Price.

Mr. Wynn: That is right, with all the parties in our attempt to establish the negative.

The Court: We will take the noon recess at this time. Is there any objection to resuming at 1:30?

Mr. Wynn: None, your Honor.

Mr. McCormick: None on my part, your Honor.

The Court: Very well. You will be excused, Mr. Greenhouse, until 1:30. Recess until 1:30.

(Whereupon a recess was taken until 1:30 o'clock p.m. of the same day, Wednesday, November 3, 1948.) [16]

Wednesday, November 3, 1948—1:30 P.M.

The Court: Are you ready to proceed in the Hurley matter, gentlemen?

Mr. Wynn: Ready, your Honor.

FRANK L. GREENHOUSE

(Recalled)

Direct Examination

(Resumed)

By Mr. Wynn:

Q. At the recess, Mr. Greenhouse, you had before you and were testifying with reference to a dividend order which was numbered 13157, I be-

(Testimony of Frank L. Greenhouse.)

lieve. Now, it is your recollection that that dividend order was prepared by you, is it?

A. Yes, sir.

Q. And who was present at the time you prepared it?      A. Mrs. Price.

The Court: You have been over all that, haven't you, or is this a different dividend order?

Mr. Wynn: This is a different dividend order which has never been offered into evidence, your Honor.

The Court: Oh, I am sorry. I assumed it was the dividend order, one of the exhibits 10 or 13.

The Witness: Mrs. Price came in and wished to have a dividend order re-issued so the checks would continue to come to her. That was on stock that had been transferred to she and Mr. Burton sometime previously. [17]

Q. (By Mr. Wynn): Did you have a conversation with her at that time relative to that subject?

A. No. I simply had a clerk go out and look up the account to see how it stood, to see that it really was in the name of Elizabeth Price and George Burton. And she said, "I want the dividends just to come to me, Mr. Greenhouse." I said, "All right, I will make a dividend order up for you," which I did right in her presence and witnessed her signature. I said, "Will you please send this on to Mr. Burton in Kansas City and have it returned as soon as possible?" Which was the usual procedure.



(Testimony of Frank L. Greenhouse.)

Mr. Wynn: We offer this document, dividend order No. 13157, into evidence as Defendant's next exhibit in order.

The Court: What is the purpose of it?

Mr. Wynn: Completing, your Honor, the connection that the officials of the Edison Company had with the parties in this action. I mean this is in the way of a negative proof, the absence of any knowledge of any fraud.

Mr. McCormick: This dividend order is one which was stipulated as the one under which the dividends under the stock certificates 1 to 7 had been paid, so it is only cumulative in that it is the order under which they acted. I see no purpose.

The Court: Wasn't that dividend order in evidence?

Mr. Wynn: No, sir. No, your Honor.

The Court: There are three dividend orders in evidence, are there not? [18]

Mr. Wynn: My recollection——

The Court: Is this a fourth one?

Mr. McCormick: My recollection, your Honor, is that there were three in evidence, but, of course, Mr. Wynn told me otherwise.

The Court: Dividend orders 12742 and 13157 are in evidence, are they not?

Mr. McCormick: That is correct.

The Clerk: 12743.

The Court: 12742 and 12743, at least, I believe are in evidence, are they not?

(Testimony of Frank L. Greenhouse.)

The Clerk: Yes, your Honor.

Mr. Wynn: That is my recollection.

The Court: But the dividend order numbered 13157 has not heretofore been received into evidence, is that it?

Mr. Wynn: That is my distinct recollection.

The Court: Very well, it will be received at this time as Defendant's next exhibit.

The Clerk: T.

Q. (By Mr. Wynn): After the conversation you have just related with Mrs. Price did you at any subsequent date have any further conversation with her or with Mr. Burton or with Mr. Hurley concerning the 575 shares of stock in the Edison Company?      A. No, sir.

Mr. Wynn: You may cross-examine. [19]

The Court: Are you positive in your recollection, Mr. Greenhouse, that you wrote into the form, the form of dividend order, the portions which you did write in pen and ink before they were taken out to be signed?

The Witness: Oh, yes, sir.

The Court: Do you have a definite recollection with respect to these particular dividend orders?

The Witness: Oh, yes, sir.

The Court: You may cross-examine.

(Testimony of Frank L. Greenhouse.)

Cross-Examination

By Mr. McCormick:

Q. Mr. Greenhouse, are you at the present time with the California Edison Company?

A. I am on compensation from the Edison Company. I am retired.

Q. When did you retire from your direct connection?      A. In May of this year.

Q. I beg pardon?      A. May of this year.

Q. May of this year?      A. Yes, sir.

Q. You were with the California Edison Company then in 1945?      A. Yes, sir.

Q. You knew of this suit that was filed by George Burton [20] in the court of Kansas which was brought to trial in the year 1945?

A. I have heard that such a case had come up, but I had nothing to do with it.

Q. At the time that that suit was pending in course of litigation were you at any time consulted by the attorneys representing the California Edison Company as to your knowledge or understanding as to this transaction?

A. No, sir; not that I recollect.

Q. You were not asked anything about it by any of the attorneys as to what the situation was with respect to these stock certificates which are designated here as 1 to 7 and were transferred supposedly on the signature of Lester Hurley which was charged to be a forgery?

(Testimony of Frank L. Greenhouse.)

A. Oh, as manager of the department, the legal department would probably have sent down and asked me to dig up all these records for them, produce everything, but I don't remember any particular question as to the authenticity of any of the signatures or anything.

Q. And you endeavored at that time to give them all the information that you had relative to this matter?

A. All that they asked for, yes, sir; the records.

Q. You were familiar with the fact, were you, that this case that is designated "Lester Hurley v. Southern California Edison Company," an issue of which is on trial in this court, [21] was pending in this court and tried here approximately two years ago? You are familiar with that fact?

A. I think I did go over with some of our legal fellows at the time, and they took a deposition of mine, very short. I forget what it was.

Q. That was the deposition that was taken in the Kansas case, was it not, Mr. Greenhouse?

A. I think it was, yes.

Q. I am referring to proceedings that have been carried on for sometime in this court. Were you consulted at all by the attorneys representing the Southern California Edison Company or any other company connected with this case relative to your knowledge and understanding and information?

A. Yes. They asked me to produce the dividend orders from my file and asked me if that was my



(Testimony of Frank L. Greenhouse.)

writing, which they knew perfectly well it was, and I said, "Sure."

Q. When did they ask you to do that first?

A. I couldn't remember that.

Q. It has been some period of time ago, has it?

A. Oh, yes.

Q. Was that prior to the time that this case was heard here in November of 1946?

A. I think so, but I would not be sure.

Q. Other than the matter of this deposition that was taken in the Kansas case, you have never been called to testify [22] in this matter before?

A. No, sir.

Q. Of course, in answer to any questions that any of the department put to you, you gave them all the information and all that you had and all your recollection concerning the matter?

A. Yes, sir.

Q. In your connection with the California Edison Company what department did you say that you handled?

A. The investment department.

Q. Is that a separate and distinct department from the transfer department?

A. Well, it covers all the various branches in the investment department. It is rather a misnomer. If I might be permitted to explain that, the primary purpose of the investment company of the Edison Company was to carry out this statutory ownership plan, which was the selling of its

(Testimony of Frank L. Greenhouse.)

stock to the consumers and its employees down through the years. Along with that, of course, they built up gradually a very large transfer department, bookkeeping department, accounting department and various other branches, so that the investment department covers all those various bureaus within the department.

Q. But ordinarily, when a matter of a transfer of stock rather than investment came into the office for attention, that [23] would not fall under your specific jurisdiction, would it?

A. No, sir; not ordinarily.

Q. Will you explain to the court as to why it was that you handled this matter of the transfer—and it was purely a transfer, was it not, Mr. Greenhouse?

A. Yes, yes.

Q. Why was that?

A. I had been 35 years with the company and I had been responsible for the sale of possibly \$200,000,000 worth of securities. Naturally, there were many hundreds, and possibly thousands, of stockholders who knew me very, very well, and they would come in year after year either to buy additional stock or to ask questions or to have stock transferred, and they preferred to deal directly with me rather than with some of the other dozens of clerks whom they probably did not know. That is the case with Mr. and Mrs. Price.

Q. With these people and that large amount of stock that you sold, they would come relative to

(Testimony of Frank L. Greenhouse.)

transfers and you would handle those personally?

A. Well, where a stockholder knew me personally and wanted my personal attention, he would ask to see me and I would take care of him, but I would ask the transfer clerks to come in and actually record receipts and see that the certificates were properly endorsed, revenue stamps on them and all that kind of stuff. [24]

Q. As I understand you, there were a great many people who fell into that class?

A. Oh, yes, surely, down through the years.

Q. How long had you known Mrs. Price, personally?

A. Oh, I should think since 1924, probably.

Q. Do you recall her having come to make investments or to take any matter up with you on various occasions over the years from 1924 to 1928?

A. Oh, yes, several times.

Q. Several times?

A. She and Mr. Price came in to buy additional stocks and take care of their rights that were issued on the stock. And they were both very elderly people and they would call me on the phone and say, "Do you think this is safe and that is safe?" Outside securities, I mean, and I would always have to tell them that I could tell them about Edison Company stock but no others.

Q. Now, Mr. Greenhouse, I believe you say that you remember distinctly explaining in some detail the meaning of joint tenancy on this occasion when they first came to see you?

A. Yes.



(Testimony of Frank L. Greenhouse.)

Q. And the method that would be necessary and essential to be followed in order for the dividends to be paid to Mrs. Price?

A. That is correct. [25-28]

Q. This stock so happened to be issued in the names of the three parties, Elizabeth J. Price, George Burton, and Lester Hurley on the date that they first came to you, is that correct?

A. On November the 19th, 1928?

Q. November the 19th? A. Yes.

Q. Did you, at that time, explain to Mr. and Mrs. Price that it would be essential that they would have a dividend order signed by all three of the parties and without which it would be impossible for your company to pay dividends to Mrs. Price?

A. Yes, I did. I explained to all three of them in my presence, each.

Q. You explained that to them at that time?

A. Oh, yes, very thoroughly.

Q. Did you also explain on that occasion that it would depend entirely upon the thoughts and desire on the part of this party, the third party who was not there? I believe you said Mr. Burton was there? A. Yes.

Q. But the third party who was not there, as to his will and desire as to whether or not a dividend order would be so signed?

A. No. That—— [29]

Q. And that he could not be compelled to give



(Testimony of Frank L. Greenhouse.)

up his interest in dividends unless he so desired?

A. No; I don't think anything like that was discussed.

Q. You do not think you discussed that?

A. I don't think so. Of course, this is 20 years ago and it was a very long conversation that we had.

Q. Yes. Mr. Greenhouse, did you mention to them at that time that in the event a dividend order was signed, that it would be subject to examination upon the will of any one of the parties signing it?

A. Yes, sir. I explained that very fully to Mr. and Mrs. Price and Mr. Burton. They understood that.

Q. So there would be no certainty that even though a dividend order was signed it would continue to carry that with it to Mrs. Price?

A. Yes, sir. I explained that very distinctly to them.

Q. You remember that definitely?

A. Yes, sir.

Q. At the time you were discussing these matters with these people in this manner that you have referred to did you make any inquiry as to who Mr. Hurley was?

A. No. They came in and sat down after they introduced me to Mr. Burton, and Mr. Price, he was quite excited. He says, "My wife and I have decided to have this stock issued in these three names," and he gave me the names. [30]

(Testimony of Frank L. Greenhouse.)

Q. You are quite sure Mr. Burton was there?

A. Oh, yes, absolutely.

Q. But did you make any inquiries as to Mr. Hurley at that time?

A. Well, Mr. Price said he was some relative of his that he wanted on there, he lived in Kansas City, I think. I don't know whether it was Kansas or Missouri, but I think he did mention that he was a relative, all right.

Q. Did he tell you that he was her grandson?

A. No.

Q. And you made no inquiry as to who he was or what their relationship was?

A. No, not after he told me that he was a relative.

Q. A relative.

A. Why should I ask him a question like that?

Q. But what the evidence of relationship was you did not ask for?      A. No.

Q. Did you ask him at all as to what the age of this party was?

A. No. I asked him if all these parties could sign contracts. He said, "Yes." And Mrs. Price said that, too.

Q. And you remember that?      A. Yes.

Q. Now, if the record shows in this case that Mr. Burton [31] has heretofore testified under oath on several occasions that he was not present at the time of this conversation that you have referred to here, would you say that was just incorrect or untrue?      A. Absolutely incorrect.

(Testimony of Frank L. Greenhouse.)

Q. You have before you dividend order 13157?

A. I think Mr. Wynn took that.

Q. Is this your signature appearing upon this instrument?

A. Yes, sir.

Q. And you desire to tell the court that the signature in your handwriting there is the same as the handwriting in which "Mrs. Elizabeth J. Price and George E. Burton" appears?

A. You mean up here?

Q. That is right.

A. Yes.

Q. The body of the instrument and signature which appears here?

A. Yes, except I used a blotter in here at the end and it looks a little lighter than the other. That is the only difference.

Q. You do concede that it was written with different ink?

A. No, not necessarily. It might have been. I had several pens and correspondence on my desk and several pens, which, being under high pressure, I would pick up one or the [32] other, whichever suited me.

Q. Mr. Greenhouse, I notice a mark here "Mar. 18, 1929." I think you testified on your direct examination that that indicates a date when the instrument is received.

A. Yes. I think that was probably true at that time.

Q. Now, I will ask you to state with respect to this certification stamp over here if the instrument was received on March 18th, what is the meaning

(Testimony of Frank L. Greenhouse.)

of these dates here that read March 13th, March 15th, and March 16th, which would all antedate the March 18th?

A. Well, it did go through the machinery on that date and finally was put in the file on March 18th, two days later, as completed business, I would imagine.

Q. Then it is your statement that this does not indicate the date when the instrument was received?

A. Not necessarily, but completed probably.

Q. I understood you to say a moment ago that it was the date when the instrument was received.

A. I might have said so, but to go back 20 years ago and ask what one little stamp means, when there is thousands of them used, it is pretty hard to say.

Q. Your memory is just as good with respect to stamps as it is with respect to what somebody came in and told you in great detail what they wanted done or did not want done with stock of 20 years ago? [33]

A. That is very different.

Q. That is very different?

A. Yes, sir. When you are talking with two human beings and discuss half an hour and discuss things from one end to another, than to see a little stamp on here, which probably I have nothing to do with—it all goes through routine—I would not be quite as sure about that. But I am sure it was put through on these dates here shown on this, which is practically the same date. This is probably the finishing date right here when filed.



(Testimony of Frank L. Greenhouse.)

Q. Then you think it was probably the finishing date rather than the beginning date?

A. Yes, although it might have gone through and been finished on the same date, as far as that is concerned, on some of them.

Q. With respect to the method of the stamping and with respect to the method of handling stock dividend orders, that was a matter which had been under your supervision and under your direction?

A. No.

Q. And with which you were familiar for years?

A. No.

Q. It was not?

A. The internal records and everything were taken care of by the assistant secretary in the investment department, and [34] he could probably explain that particular item that you questioned there.

Q. Did you learn, Mr. Greenhouse, as to when William Price died?

A. Oh, I suppose I must have heard about it indirectly, but when, I could not say; probably a considerable time after he died.

Q. Didn't Mrs. Price inform you rather promptly of his death after it occurred?

A. Apparently not, no, not me directly.

Q. Not that you remember? A. No.

Q. Now, I believe you have testified that you had two conversations with Mr. and Mrs. Price—the first one on November 19, 1928?

A. Yes.

(Testimony of Frank L. Greenhouse.)

Q. And then one a few days later?

A. That is right.

Q. How many days later would you say?

A. Three days later.

Q. Three days later?           A. Yes.

Q. And that was with respect to likewise a transfer of stock?

A. Preferred stock and some common belonging to Mrs. [35] Price, herself.

Q. Aren't you familiar with the fact that these other transfers to which you refer did not occur several days later but occurred the next day?

A. I don't think that is so.

Q. Well, if the stock certificates were issued on that day, then your memory would be corrected, is that right?

A. Well, I know the receipts given them for this second bunch of certificates was dated three days later when they came in.

Q. You have checked those to refresh your recollection?           A. Yes, sir.

Q. And it is on the check-up now that you have made here recently upon which you are largely relying?           A. That is right.

Q. Is that also true with respect to your recollection and memory of what occurred here as between these parties, refreshing your recollection, and that you deduce that these things should have occurred because the record shows that certain action was taken?

A. Oh, no; not at all, not at all.

(Testimony of Frank L. Greenhouse.)

Q. I will ask you to state, Mr. Greenhouse, whether it is not a fact that between January 5th, the date upon which William Price died, and January 17th, the date upon which his body was returned to Kansas City, Missouri, for burial, [36] that Mrs. Elizabeth J. Price and George Burton came to your office and consulted you with respect to a stock transaction?

A. No, sir; not to me personally.

Q. Not with you?           A. No, sir.

Q. Then you will also say that if it has been testified to here on several occasions by George Burton that he did just that, then he is in error in that regard?

A. I would distinctly say so. He could have come to the Edison Company. He did not come to me.

Q. No, I am speaking about a conversation with you.           A. No, sir.

Q. Isn't it a fact that upon that occasion Mr. Burton and Mrs. Price presented to you seven stock certificates which have been introduced in this case here as Exhibits 1 to 7—and I have them—presented these stock certificates to you and told you at that time that Lester Hurley's name was included in those stock certificates by mistake and error, and wanted to arrange with you to have the stock transferred out of his name and into the names of Burton and Price as it should have been in the first place?

(Testimony of Frank L. Greenhouse.)

A. No, sir. The first I ever heard about this transfer was several months after it had taken place, from Kansas City, through the bank.

Q. Then Burton and Price just did not have any such [37] conversation as that with you?

A. No, sir; not personally.

Q. Concerning these stock certificates?

A. No, sir.

Q. Isn't it a fact, Mr. Greenhouse, that at that time you furnished to these people the assignment blanks which appear upon the back of these certificates by means of which the transfer was effected?

A. Not necessarily, no. Those are blanks you can get at the counter or anywhere. Those are ordinary assignment blanks.

Q. If that occurred and the assignment blanks were furnished by you to the people there at that time, you just do not have any recollection of it?

A. No, sir.

Q. When Defendant's Exhibit T, No. 13157, was presented to you at the time Mrs. Price was in your office did you at that time note that the signature, by reason of the provision in the order, only called for the signatures of Price and Burton?

Mr. Wynn: For the purpose of the record, let us refer to this document correctly. You called it Exhibit No. 13157.

Mr. McCormick: I said a dividend order number.

The Court: What is the exhibit number?



(Testimony of Frank L. Greenhouse.)

Mr. McCormick: Oh, the exhibit number, if you desire it, Mr. Wynn, is Defendant's Exhibit T. [38]

Mr. Wynn: I do not desire it. I want the record to show what it is.

The Court: It is specified now, gentlemen. Proceed. You may answer the question, Mr. Greenhouse.

Mr. McCormick: Please.

A. Mrs. Price came into the office and said that she desired to have here dividends still issued in her name on all the stock that she was joint tenants with. So I naturally had a clerk go out and check up the account. He came back. I asked how the title was standing now and I wrote this up for her and witnessed her signature. I told her that, of course, she would have to get Mr. Burton's signature, too.

Q. Did you ask her at that time as to whether she had arranged to have the interest of Lester Hurley, whose name the stock, you knew, had been previously issued in, eliminated? A. No.

Q. You did not ask that?

A. No. It was not my place to ask her a question like that.

Q. Now, Mr. Greenhouse, I notice here in this instrument that there has been some name written in here which was stricken out, which purports to be, in the first place, as "George E. Price, Jr."

A. No.

(Testimony of Frank L. Greenhouse.)

Q. And "E. Price, Jr.," has been stricken [39] out.           A. No.

Q. Did you do that?

A. Yes, I did that, but it was not meant to be "George E. Price, Jr." Naturally, most every day the hundreds that I take care of, I naturally quickly wrote this, but I was probably pushed at the time, and instead of writing "George E. Burton," automatically I put the word "Price" down and crossed it out. That "Jt." means "joint tenants," not "Junior." Of course, ordinarily we don't put on "joint tenants with full rights of survivorship." That is understood. And then I told her to have that properly signed and sent back to the company.

Q. Mr. Greenhouse, I notice that there is a printed statement at the bottom of this dividend order which reads: "Dividend order must be signed by record owner of stock exactly as the name or names appear on the certificate."           A. Yes.

Q. "If signed by agent, evidence of authority must accompany Dividend Order."           A. Yes.

Q. That is the requirement made on the part of the company?           A. Yes.

Q. And that appears on all the dividend orders that are issued by the company? [40]

A. Yes; I think so, for many, many years.

Q. I will ask you to state, Mr. Greenhouse, if this classification of checking here,—is involved in that is the matter of checking signatures to see that they are correct and proper for the purpose of

(Testimony of Frank L. Greenhouse.)

effecting a transfer either of the dividends or of the transfer of the stock itself?      A. Oh, yes.

Q. That is done?      A. Yes.

Q. If the signature appearing either on the dividend order or stock assignment was not identical with that which appeared on the face of the certificate, it would not be considered as regular or proper or acted upon by the company?

A. That is right.

Q. I call your attention, Mr. Greenhouse, to Plaintiff's Exhibits 1 to 7 and ask you to note on the face of these certificates, each one of them, as to how the name "Hurley" appears, as to how it is designated.

A. That says "Lester Hurley," "Lester Hurley," "Lester Hurley," "Lester Hurley," "Lester Hurley."

Q. Now, will you take a look at the assignments and see how the signature purports to have been signed on the assignment.

A. "Lester W. Hurley." [41]

Q. So in that instance they were not assigned in identically the same manner as that in which they appeared on the face, is that correct?

A. Yes, that appears correct.

The Court: Is that the same on all of them, referring now particularly to the assignment blanks only on the stock, and not to the dividend orders?

Mr. McCormick: That is right, just to the assignment blanks.

(Testimony of Frank L. Greenhouse.)

The Court: Any further questions?

Mr. McCormick: Just one or two more, your Honor.

Q. I call your attention to dividend order now numbered 12742, and I will ask you to look at the signature of "Lester Hurley" appearing thereon and note whether or not it seems to be spelled in the same manner as it appears in the instrument?

A. It does.

Q. You notice that "Hurley" is spelled "H-u-r-l-e-e-y" in the signature? A. No.

Mr. Wynn: I object to that as assuming something not in evidence, the way it is spelled. The court will recall the protracted testimony with reference to signatures.

Mr. McCormick: I am merely directing this witness' attention to that stipulation. [42]

The Court: Overruled.

A. It seems to me it is substantially the same way.

Q. (By Mr. McCormick): You construe that as being "H-u-r-l-e-y," do you? A. Yes, sir.

Q. Mr. Greenhouse, back in 1944, were you requested by the company to make a complete and diligent search of the files for the purpose of ascertaining whether or not there was any correspondence between your company and the Brotherhood State Bank or Mr. Alberti relative to the transfer of the certificates Exhibits 1 to 7 for plaintiff to which I called your attention?



(Testimony of Frank L. Greenhouse.)

A. Such a request may have been made to the department, to Mr. Showers, who had charge of the records. It was not made to me direct that I remember.

Q. Well, you did make such a search, did you not?

A. Oh, yes, I probably helped search for all these various things.

Q. And you found nothing?

A. Oh, I wouldn't say that.

Q. Concerning matters and letters concerning this transfer?

A. Oh, I think there was some correspondence with a bank in Kansas City there that they had.

Mr. Wynn: Do you want these exhibits, the correspondence [43] in evidence between the bank and the Edison Company?

Mr. McCormick: Oh, no.

Mr. Wynn: You are questioning the witness concerning it.

Q. (By Mr. McCormick): Mr. Greenhouse, I will ask you to state whether or not you now claim that these exhibits which are Plaintiff's Exhibits 17 and 18 were found in your files in your company's office?

A. I would prefer to have the assistant secretary, Mr. Showers, on there. He probably made the search for this kind of correspondence. Those would not be in my own particular files.

Q. You do not recall having testified in a deposition that you gave that you found no corres-

(Testimony of Frank L. Greenhouse.)

pondence with respect to this stock transfer, only correspondence of a recent date after the litigation arose; you do not recall that?

A. No; I can't remember that, but I remember that they only asked me one question or something like that, one or two questions, in the deposition. I don't think it had anything to do with that.

Mr. McCormick: Very well, that is all.

The Court: You may step down, Mr. Greenhouse.

Mr. Wynn: Nothing further. May I ask whether counsel or the court desires Mr. Greenhouse any further? He has been in rather ill health and I think wants to be dismissed.

Mr. McCormick: I would like to ask the witness one more [44] question, if I may, before he leaves.

The Court: You may.

Q. (By Mr. McCormick): Mr. Greenhouse, you have referred to the fact that it has been a long time since this matter occurred, 20 years?

A. Yes.

Q. Do you desire to tell the court now that you remember with any particularity as to when those dividend orders were filled in as to the names of the parties, either as to whether it was at the time that the dividend orders were delivered or when they were returned?

A. It was absolutely at the time they were in my office, sir. I always handle them in that way, thousands of them, where they had to go and get the signatures somewhere else.

Q. And you handled thousands of them?

A. Yes, sir; many thousands.

Mr. McCormick: Very well.

The Court: Are you so testifying because of your practice, or because you have a specific recollection of this particular item?

The Witness: Well, in this case I have a specific recollection, too, sir. Mr. Price was a very fine old gentleman, very old and sick, and I tried to give him a little extra attention. And I remember all the conversation very well with him there, a very sick man. I remember it very well. [45]

The Court: You may step down.

Mr. Wynn: May the witness be excused?

The Court: Is there any occasion to require any further attendance of Mr. Greenhouse?

Mr. McCormick: I think not, your Honor.

The Court: You are excused.

The Witness: Thank you, sir.

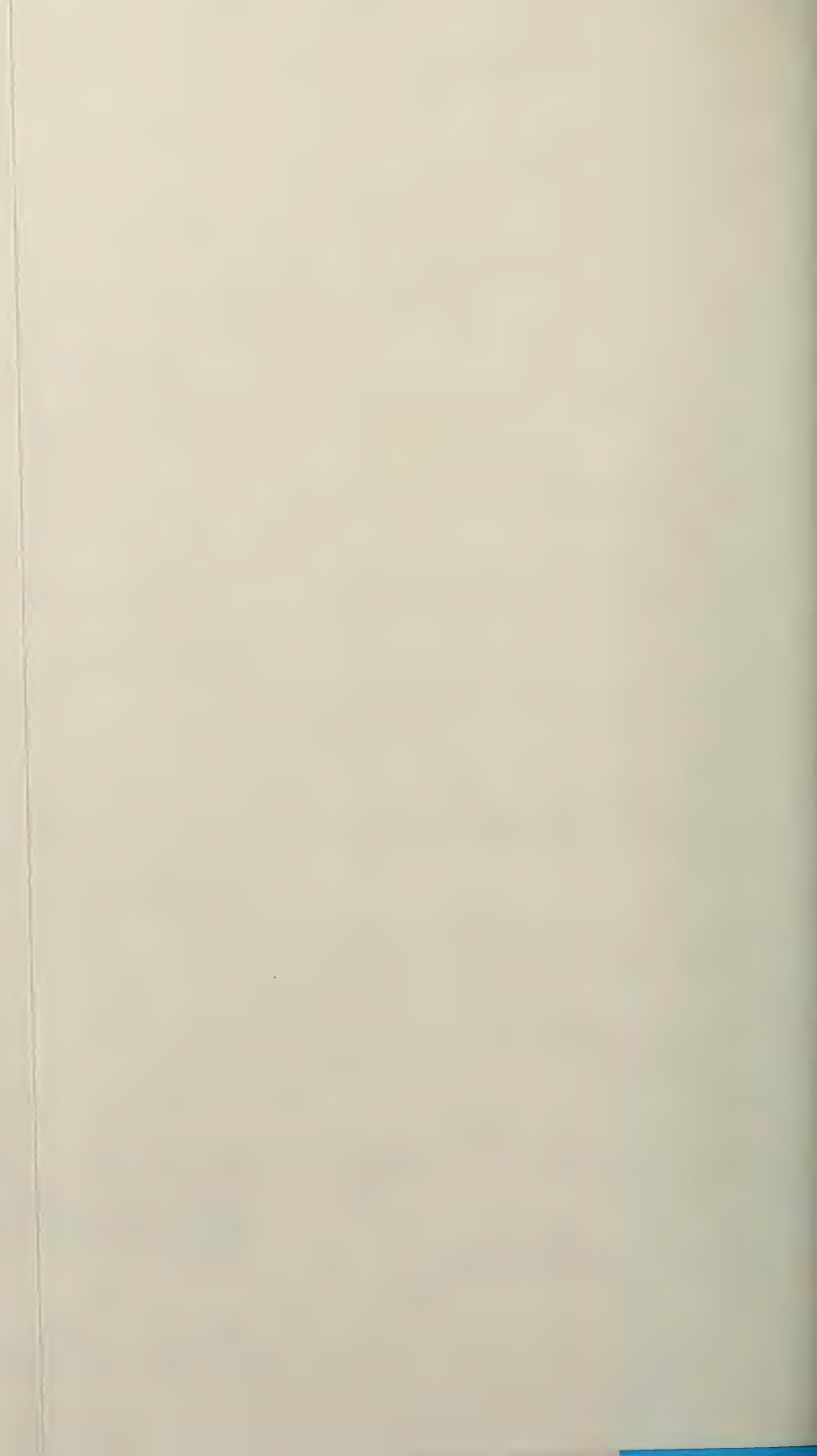
The Court: Your next witness.

[Endorsed]: Filed October 25, 1951. [46]









PLAINTIFF'S EXHIBIT No. 20

Resolution of Board of Directors of  
Southern California Edison Company

Adopted: January 25, 1929

**Re:** Issuance and Sale of Two Hundred Fifty-six  
Thousand Shares of Common Stock, of the  
total par value of Six Million, Four Hundred  
Thousand Dollars.

Whereas, it is desirable that this corporation issue and sell at par, Two Hundred Fifty-six Thousand (256,000) shares of this corporation's Common stock, of the par value of Twenty-five Dollars (\$25.00) per share, and of the total par value of Six Million, Four Hundred Thousand Dollars (\$6,400,000), for the purpose of paying the cost of new construction; and

Whereas, upon the issuance of said additional Common stock, each of the Common stockholders and of the Original Preferred stockholders of this corporation will be entitled to subscribe for and purchase a pro rata portion of said stock in accordance with such stockholders' ownership of Common and/or Original Preferred stock of this corporation.

Now, Therefore, Be It Resolved, that this corporation issue and sell Two Hundred Fifty-six Thousand (256,000) shares of its Common stock, of the par value of Twenty-five Dollars (\$25.00) per share, and of the total par value of Six Million, Four Hundred Thousand Dollars (\$6,400,000).

Be It Further Resolved, that the Common and

the Original Preferred stockholders of this corporation of record on the 29th day of March, 1929, be given the opportunity to subscribe for and purchase said stock at par, Twenty-five Dollars (\$25.00) per share, payable in cash; that each holder of Common stock and each holder of Original Preferred stock be permitted to subscribe for and purchase such Common stock between April 22, 1929, and May 21, 1929, inclusive, at the rate of one share of such Common stock for every ten shares of Common stock and/or Original Preferred stock of the corporation owned by him on the 29th day of March, 1929; that no fractional shares be issued.

That a notice to holders of Common stock and of Original Preferred stock, of the offering herein authorized, be published in a daily newspaper in each of the cities of New York, Boston, Chicago and Los Angeles, on the following dates, to wit: March 15, 1929, March 22, 1929, and March 29, 1929.

That a letter be mailed to stockholders entitled to subscribe for said new issue of Common stock, on or before March 14, 1929, said letter to contain the terms and conditions of the offering, and such general information as the Chairman, or in the absence of the Chairman, the President, shall deem proper.

That warrants representing each stockholder's right to subscribe for and purchase said additional shares be issued and mailed or delivered on or before April 22, 1929, together with a letter setting



forth the terms and conditions upon which the said right to subscribe may be exercised, as set out in this resolution, to each stockholder having such right of record on said 29th day of March, 1929; that all of said warrants representing rights to subscribe for and purchase full shares be issued in the name of the stockholder and be assignable by endorsement and delivery of the warrant, and all of said warrants representing rights to subscribe for and purchase fractional shares be issued to bearer and be transferable by delivery; that all warrants bear a facsimile signature of the Chairman of the corporation, and be countersigned by an Assistant Secretary of the corporation, and contain thereon a subscription form; that the said warrants contain a statement that the same will become wholly void and of no value if the subscription rights represented thereby are not exercised on or before said May 21, 1929, and that subscriptions may be made for whole shares only, and such other matter as the Chairman, or in the absence of the Chairman, the President, shall determine upon.

That said warrants be received with subscriptions and cash payments made at Bankers Trust Company, 16 Wall Street, New York, and at the Investment Department of the corporation, 306 West Third Street, Los Angeles, California; that all subscriptions be in writing on the form provided on said warrant; that all full share warrants be transferable on the records of the corporation, and new warrants be issuable in lieu thereof at either of said places; that all warrants be exchangeable at

either of said places for warrants of different denominations as the holder may designate, aggregating the same total; that such organization, records and regulations be established to facilitate the transfer, exchange and receipt of warrants, the acceptance of subscriptions and the issuance of receipts therefor when fully paid, and thereafter the issuance of stock certificates, as the Chairman, or in the absence of the Chairman, the President, may determine upon.

Be It Further Resolved, that the President, or any one of the Vice-Presidents, be and they are hereby authorized and directed for and on behalf of the corporation to make application to the Railroad Commission of the State of California, for permission to issue and sell said Two Hundred Fifty-six Thousand (256,000) shares of the Common capital stock of this corporation, and upon securing the approval of said Commission to notify the New York Stock Exchange of said offering at least ten days prior to said 29th day of March, 1929.

Be It Further Resolved, that the President, or any one of the Vice-Presidents, and the Secretary, or any one of the Assistant Secretaries, be and they are hereby authorized and directed for and on behalf of the corporation, when the Railroad Commission of the State of California shall have authorized said issue, to make application to the said New York Stock Exchange for the listing of said additional Two Hundred Fifty-six Thousand (256,000) shares of Common capital stock, and to

execute any and all instruments of any kind or character whatsoever, and to perform any and all acts required, or which may be deemed necessary or proper to secure the listing of said stock, or to carry out any of the provisions of this resolution.

Be It Further Resolved, that B. W. Jones and George De B. Greene, be and they are hereby designated by this corporation to appear before the Committee on Stock List of said New York Stock Exchange, with authority to make such changes in said application for the listing of said Two Hundred Fifty-six Thousand (256,000) shares of the Common capital stock of this corporation, of the aggregate par value of Six Million, Four Hundred Thousand Dollars (\$6,400,000), or in any agreement relative thereto, as may be necessary to conform with requirements for listing.

I, O. V. Showers, Secretary of Southern California Edison Company, Ltd., do hereby certify that the foregoing is a full, true and correct copy of the Resolution of the Board of Directors of said corporation adopted at a meeting of said Board duly called and held on the 25th day of January, 1929.

[Seal]      /s/ O. V. SHOWERS,

Secretary, Southern California  
Edison Company, Ltd.

Admitted November 13, 1946.



## PLAINTIFF'S EXHIBIT No. 22

Southern California Edison Company Ltd.  
Edison Building

Los Angeles, California

March 29, 1944.

Thurman L. McCormick,  
Suite 910 Rialto Building,  
Kansas City, Missouri.

In Re: Estate of Mrs. Elizabeth J. Price,  
Deceased.

Dear Sir:

We have for acknowledgement your letter of March 21st enclosing notice from Lester Hurley alleging illegality in the transfer of 575 shares of Edison Company Common Stock, from the names of Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley as joint tenants to Mrs. Elizabeth J. Price and George E. Burton as joint tenants, and have placed transfer stops in accordance therewith. However, in the event of demand for transfer is made on the Company, we will require for our protection, a Court Restraining Order.

We are not able to decipher the name of the officer of the Brotherhood State Bank who signed the signature guarantee for the bank, but you no doubt can ascertain same by asking the bank to identify the signature.

The dividends on the stock were paid to Mrs. Elizabeth J. Price in accordance with a dividend



order signed by the three joint tenants and filed with the Company. At that time Lester Hurley gave his address as 5716 Scarritt, Kansas City, Mo. His signature was witnessed by Helen Burton, 1046 Ann Ave., Kansas City, Kans.

As requested, we are enclosing photostats of both sides of the certificates representing the 575 shares registered in the names of Mrs. Elizabeth J. Price and George E. Burton and Lester Hurley as joint tenants.

Will you kindly keep us advised with reference to any litigation or developments in connection therewith relative to the determination of the ownership of the stock in question.

Substantially the same information has been supplied Stanley, Stanley, Schroeder, Weeks & Thomas, attorneys for George E. Burton.

We are enclosing herewith our check No. 21847 for 30 cents payable to your order, in refund of excess amount forwarded for expense incident to photostatic copies of certificates.

Your very truly,

/s/ O. V. SHOWERS,  
Asst. Secretary.

OVS:JK

Encl.

Air Mail

Admitted November 15, 1946.

## PLAINTIFF'S EXHIBIT No. 23

Minute Book, Vol. 5, page 275.

Extracts From the Special Meeting of Board of Directors of Southern California Edison Company, Ltd.

Held on Wednesday, November 23, 1932, at the office of the Company, Room 1225, Edison Building, 601 West Fifty Street, Los Angeles, California, at 12:30 p.m.

Be It Resolved, that those certain resolutions respecting dividend policy, adopted by the Board of Directors of this corporation on October 12, 1923, and August 26, 1927, be and the same are, and each of them is, hereby repealed.

Whereas, it is the policy of this Board of Directors (1) to declare four dividends each year upon the outstanding Original Preferred capital stock of this corporation, and upon the outstanding Preferred stock, Series "C," 5½% of this corporation, payable January 15th, April 15th, July 15th and October 15th, respectively, to the owners in proportion to their respective holdings of such stock of record at the close of business on the 20th day of the month preceding the date fixed for payment, said payments being for the quarters ending December 31st, March 31st, June 30th and September 30th, respectively; (2) to declare four dividends each year upon the outstanding Preferred stock, Series "A," 7%, of this corporation, and upon the outstanding Preferred stock, Series "B,"

6%, of this corporation Payable March 15th, June 15th, September 15th and December 15th, respectively, to the owners in proportion to their respective holdings of such stock of record at the close of business on the 20th day of the month preceding the date fixed for payment, said payments being for the quarters ending February 28th, (29th in leap years), May 31st, August 31st and November 30th, respectively; and (3) to declare four dividends each year upon the outstanding Common stock of this corporation, payable February 15th, May 15th, August 15th and November 15th, respectively, to the owners in proportion to their respective holdings of such stock of record at the close of business on the 20th day of the month preceding the date fixed for payment, said payments being for the quarters ending January 31st, April 30th, July 31st and October 31st, respectively;

Now, Therefore, Be It and It Is Hereby Resolved, that dividends upon the various classes of capital stock of this corporation as hereafter declared, shall be payable at the times and to the stockholders hereinabove and hereinafter specified, unless otherwise expressly provided in the resolutions declaring such dividends.

Be It Further Resolved, that as to each share of Preferred stock full and final payment upon which shall be made after the first day of a dividend quarter, the dividend payable on such stock for the quarter during which such full and final payment was made, shall be determined, with reference to the dividend payable upon other stock of the same



class which was fully paid for on or previous to the beginning of the dividend quarter, by the ratio the time during such dividend quarter such stock was fully paid for bears to the whole of the dividend quarter. In all cases where the subscription contract under which such stock is purchased so provides, the first dividend declared on fully paid paid for Preferred stock shall be paid to the owner of record of such stock at the close of business on the last day of the month preceding the month in which payment is to be made.

Be It Further Resolved, that as to each share of stock sold to officers or employees the subscription for which shall have been accepted subsequent to the first day of the dividend quarter for which the dividend is declared, the dividend payable on such stock for the dividend quarter during which the subscription for such stock is received, shall be determined in all cases where the subscription contract so provides, with reference to the dividends payable upon other shares of stock which were fully paid for on or previous to the beginning of the dividend quarter, by the ratio the time during such dividend quarter such subscription for stock was in effect bears to the whole of the dividend quarter. The first dividend declared on each class of stock sold under such a subscription contract, shall be paid to the owner of record of such stock at the close of business on the last day of the month preceding the month in which payment of dividend is to be made.



Resolved, that on January 15, 1933, there be paid from the surplus earnings of this corporation to the holders of the Original Preferred stock of this corporation, outstanding on December 20, 1932, a dividend of 2% of the par value of such stock, the payment of such dividend to be made in accordance with the provisions of resolution of this Board heretofore this day adopted.

Resolved, that on January 15, 1933, there be paid from the surplus earnings of this corporation to the holders of Preferred stock, Series "C," 5½%, of this corporation, outstanding on December 20, 1932, and such additional Preferred stock, Series "C," 5½%, as shall be outstanding on December 31, 1932, a dividend of 1.375% of the par value of such stock, the payment of such dividend to be made in accordance with the provisions of resolution of this Board heretofore this day adopted, such dividend to be proportionate in certain cases in the manner specified in said resolution.

**Admitted November 3, 1948.**

## PLAINTIFF'S EXHIBIT No. 25

November 30, 1945.

Southern California Edison Co., Ltd.,  
Edison Building,  
Los Angeles, California.

Attention: B. F. Woodward,  
General Solicitor.

Re: Hurley Dividends.

Gentlemen:

Under date of October 15th, I wrote you fully relative to the dividends due on stock owned by Lester W. Hurley in your company, a portion of which stock was involved in litigation in the case of *Burton vs. Hurley*, #4974 Civil (Kansas).

Thereafter under date of November 7th, I received a reply to my letter of October 31st, 1945, wherein you advised me that this matter had been called to the attention of your bonding company and that as soon as any definite conclusion regarding the matter was reached, that you would get in touch with me in the hope of working out this matter satisfactorily. Since receiving your letter on November 7th, I have had no further advice concerning this matter, and I am at a loss to understand why so much time is required to reach a conclusion in this matter.

I have no objection to your taking all necessary time for the purpose of reaching a deliberate conclusion, but it does seem to me that a period of

six weeks should be adequate. I therefore must insist that I be advised within a reasonable time as to the position you desire to take in this matter.

Trusting that I may hear from you promptly  
I am

Very truly yours,

THURMAN L. McCORMICK,  
910 Rialto Building,  
Kansas City, Missouri.

TLM:EC

Admitted November 3, 1948.

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PLAINTIFF'S EXHIBIT No. 26

Pacific Indemnity Company  
Los Angeles

Milton R. Johnson, President  
621 South Hope Street, Los Angeles 14

December 7, 1945.

Mr. Thurman L. McCormick,  
Attorney at Law,  
Suite 910 Rialto Bldg.,  
Kansas City, Missouri.

Re: Our Claim 5252—Bond 109186  
Forgery—Sign. Lester Hurley  
Southern California Edison Company,  
Ltd., et al.

Dear Sir:

You letter of November 30, 1945, to Southern California Edison Company, Ltd., attention B. F.

Woodard, General Solicitor, has been referred to us for attention. Please be advised that we are referring this matter to our legal representatives in Kansas City, Missouri. We are requesting them to contact you as soon as they have had an opportunity to assimilate the data which we are forwarding to them. I trust that they will contact you within a reasonable time.

Very truly yours,

/s/ PHILIP B. KEHR,  
Attorney.

PBK:C

Admitted November 3, 1948.

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PLAINTIFF'S EXHIBIT No. 27

December 20, 1945.

Pacific Indemnity Company,  
621 South Hope Street,  
Los Angeles 14, California.

In Re: Claim 5252—Bond 109186

Forgery—Sign. Lester Hurley  
Southern California Edison Com-  
pany, Ltd., et al.

Gentlemen:

Your letter of December 7, 1945, received some time ago, wherein you advised that the above-entitled matter had been referred to you for atten-



tion by B. F. Woodard, General Solicitor of the Southern California Edison Company, Ltd. Further that you were referring the matter to your legal representatives in Kansas City, Missouri, with the expectation that they would contact me as soon as they had had an opportunity to assimilate the data which you were forwarding to them.

I am writing to advise that I have received no communication from your representatives in Kansas City, Missouri, relative to this matter, which I am at a loss to understand.

I do not know whether you are aware of the fact that this matter was called to the attention of Southern California Edison Company, Ltd., under date of October 15th. Since that date I have made several requests for declaration as to the position the Southern California Edison Company desires to take in this matter or the position the Bonding Company desires to adopt. As indicated above, I have to date received no definite statement, one way or the other, as to what, if anything, you propose to do relative to this claim.

Now, as the time that has elapsed indicates, I am quite desirous of giving the Southern California Edison Company or your Company adequate opportunity to determine, with due deliberation, the position you desire to take, but I do feel that adequate time has elapsed to enable you to come to some conclusion. I am, therefore, writing to you at this time for the purpose of advising you that I shall expect a prompt declaration on your part as to what

you desire to do relative to this claim. Failing to receive the same without further delay will be construed by me as a declaration on your part of a refusal to recognize the same and will be acted upon accordingly.

Trusting I may hear from you promptly, I am,

Yours very truly,

THURMAN L. McCORMICK,

TLMcC:lmv

Admitted November 3, 1948.

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PLAINTIFF'S EXHIBIT No. 28

Pacific Indemnity Company

Los Angeles

Milton R. Johnson, President

621 South Hope Street, Los Angeles 14

December 27, 1945

Mr. Thurman L. McCormick,

Attorney at Law,

Suite 910 Rialto Bldg.,

Kansas City, Missouri.

Re: Our Claim 5252—Bond 109186

Forgery—Sign. Lester Hurley

Southern California Edison Company Ltd.,  
et al.

Dear Sir:

This will acknowledge receipt on this date of your letter of December 20, 1945.

The firm of Watson, Ess, Groner, Barnett & Whittaker is representing the Pacific Indemnity Company in this matter and we are forwarding to their attention a copy of your letter of December 20, 1945.

Very truly yours,

/s/ PHILLIP B. KEHR,  
Attorney.

PBK:C

cc Watson, Ess, Groner, Barnett & Whittaker

Admitted November 3, 1948.

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PLAINTIFF'S EXHIBIT No. 29

January 8, 1946.

Southern California Edison Company, Ltd.,  
Edison Building,  
Los Angeles 53, California.

Attention: Mr. B. F. Woodard,

Gentlemen:

Re: Lester W. Hurley Dividends

Under date of October 15, 1945, I asked you to furnish me "at your early convenience, with a statement as reflected by the books of your company showing all dividends and stock rights paid and delivered to Elizabeth J. Price on the afore-said stock as well as other stock standing in the name of Lester W. Hurley from the 20th day of November, 1928, to date of the death of Elizabeth J. Price, namely December 27th, 1943."

To date you have not furnished me with the statement requested, as indicated above. I am informed by the attorneys to whom this matter was referred by your Bonding Company, Pacific Indemnity Company, that such a statement as to dividends and stock rights has been provided them. This, of course, does not serve my purpose, and I am therefore obliged to repeat my request.

I would appreciate receiving this information without further delay, and will thank you to give me a prompt reply concerning the same.

I am,

Yours very truly,

THURMAN L. McCORMICK.

Admitted November 3, 1948.

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PLAINTIFF'S EXHIBIT No. 30

Southern California Edison Company, Ltd.  
Edison Building  
Los Angeles 53, California  
Law Department

January 18, 1946.

Thurman L. McCormick, Esq.,  
Suite 910, Rialto Building,  
Kansas City 6, Missouri,

Re: Lester W. Hurley Dividends

Dear Mr. McCormick:

With respect to your request for a statement of



dividends and stock rights paid on the stock formerly standing in the name of Elizabeth J. Price, I am sure you will appreciate that, in view of the fact that the bonding company has employed counsel to pass on the matter, it would probably be more in order to have you request the information from their attorneys.

I would not want to do anything that would in anywise prejudice the Company's relations with the bonding company, and if it agreeable to their attorneys that you have the information requested, there would be no objection on our part. Therefore, I suggest that you confer with their attorneys to ascertain whether they have any objection to your having this information, and if they have no objection, request that they furnish the information to you.

Very truly yours,

/s/ B. F. WOODARD,  
General Solicitor.

Admitted November 3, 1948.

## PLAINTIFF'S EXHIBIT No. 31

Watson, Ess, Barnett & Whittaker  
15th Floor, Dierks Building  
Kansas City 6, Missouri

February 8, 1946.

Mr. Thurman L. McCormick,  
Attorney at Law,  
910 Rialto Building,  
Kansas City 6, Missouri.

Dear Sir:

Pursuant to your request we advise you that the Southern California Edison Company paid to Elizabeth J. Price on February 15, 1929, a dividend of \$287.50 on 575 shares of common stock, issued November 20, 1928, pursuant to dividend order No. 12742. Thereafter, on the same number of shares issued February 19, 1929, it paid her dividends to and including December 27, 1943, in the total sum of \$15,108.12, pursuant to dividend order No. 13157. In each of the years 1929 to 1931, inclusive, it also issued to her 575 common stock rights.

On 88 shares of common stock issued November 26, 1928, it paid her dividends for the years 1929 to 1943 inclusive, in the total sum of \$2,356.20, pursuant to dividend order No. 12743. On the same stock, in each of the years 1929 to 1931, inclusive, it issued to her 88 common stock rights.

On 191 shares of preferred Series "B" 6% stock issued November 26, 1928, it paid her dividends during the years 1929 to 1943, inclusive in the total sum of \$4,297.50, pursuant to dividend order No. 12743.

We will communicate with you again as soon as we have completed our study of Mr. Hurley's claim and are advised of our client's wishes. Please accept our apologies for our inability to sooner advise you of the above figures.

Very truly yours,

WATSON, ESS, BARNETT &  
WHITTAKER,

By /s/ DOUGLAS STRIPP.

DS/is

Admitted November 3, 1948.

## DEFENDANT'S EXHIBIT C

## Notice

Notice Is Hereby Given to the Southern California Edison Co. Ltd., and all officers, transfer agents and servants, that certificates Nos. AO 59630; AO59630 and A 8752 to A 8756, inclusive, issued under date of November 20, 1928, to Elizabeth J. Price, George E. Burton and Lester Hurley, as joint tenants, and thereafter cancelled under date of February 2, 1929, were illegally, unlawfully, and fraudulently cancelled without the knowledge, consent or authorization of Lester Hurley, and without the true and legal endorsement of Lester Hurley on said certificates.

You and each of you are further notified that certificates No. AO 61852 and A 9230 to A 9234, inclusive, issued to Elizabeth J. Price and George E. Burton under date of February 19, 1929, in the place and stead of the certificates first above described, were illegally and unlawfully issued without the surrender of the original certificates properly endorsed, and therefore constitute a fraud upon Lester Hurley and his true and lawful ownership in the 575 shares of common stock represented thereby.

You and each of you are further notified and requested to make no further transfers of the cer-



tificates last above described until the legal right and ownership of the undersigned stockholder in said certificates has been adjudged and determined.

Signed and dated at Kansas City, Missouri, March 20th, 1944.

/s/ LESTER HURLEY.

State of Missouri,  
County of Jackson—ss.

On this 20th day of March, 1944, before me, N. R. Fischer, a Notary Public, personally appeared Lester Hurley to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in Kansas City, Missouri, the day and year last above written.

[Seal]      /s/ N. R. FISCHER,  
Notary Public.

My Commission expires May 31, 1946.

Admitted November 12, 1946.



344

FORM—INV. 31-A REV.

DEFENDANT'S EXHIBIT T

KINDLY SIGN AND RETURN AT ONCE

13157

SOUTHERN CALIFORNIA EDISON COMPANY  
DIVIDEND ORDER

Date LA 192...

Southern California Edison Company,  
Los Angeles, California.

Gentlemen:

Until this order is revoked in writing, please remit to Mrs Elizabeth J. Price.

at the address given below, by check drawn to his order, the dividend now due, or which may become due on all shares of stock of your company, now or hereafter standing in the name of

Mrs Elizabeth J. Price and George E. Burton  
~~E. Price Jr~~  
on the books of your company.

Stock how held—

Original Preferred Preferred Series A  
Common Preferred Series B

Classified By	<u>MIX</u>	<u>3-15</u>
Serials Cont'd By	<u>Paul</u>	<u>3-15</u>
Plant Checked By	<u>Ron</u>	<u>3/16</u>
Inspected Checked By	<u>Ron</u>	<u>3/16</u>
Entered in Ledger By		

X Signature: Mrs Elizabeth J. Price  
Address: 1301 West 52nd St

X Signature: George E. Burton  
Address: 1046 Ann Ave

Kansas City, Mo

Witness: [Signature]  
Signature: [Signature]

Address: .....

Address for sending dividends: 1301 - West 52nd St  
Los Angeles

Note: Dividend Order must be signed by record owner of stock exactly as the name or names appear on the certificate. If signed by agent, evidence of authority must accompany Dividend Order.

Admitted November 3, 1946.

NAB 18 1946





[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 116, inclusive, contain the original Complaint; Answer of Defendant; Defendant's Memorandum of Points and Authorities; Pre-Trial Stipulation; Supplemental Answer of Defendant; Findings of Fact and Conclusions of Law After Trial Following Appeal; Judgment; Motion of Defendant for New Trial; Order Amending Findings of Fact and Denying Defendant's Motion for a New Trial; Notice of Appeal; Statement of Points on Which Defendant and Appellant Intends to Rely on Appeal; Designation of Contents of Record on Appeal; Two Motions and Orders Extending Time to File Record on Appeal and Stipulation re Designation of Contents of Record on Appeal which, together with original plaintiff's Exhibits 1 to 20, inclusive, 22, 23, and 25 to 31, inclusive, and original defendant's exhibits A, C, and T and original Plaintiff's exhibit 1 on retrial, and copy of reporter's transcript of proceedings on November 12, and 13, 1946, and November 3, 1948, transmitted herewith, constitute the record on appeal to the United State Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 26th day of October, A.D. 1951.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

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[Endorsed]: No. 13143. United States Court of Appeals for the Ninth Circuit. Southern California Edison Company, Limited, a corporation, Appellant, vs. Lester W. Hurley, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 27, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

No. 13143

LESTER W. HURLEY

Appellee,

vs.

SOUTHERN CALIFORNIA EDISON COM-  
PANY, LIMITED, a Corporation,

Appellant.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY ON  
APPEAL

On appeal from the judgment herein entered pursuant to Findings of Fact and Conclusions of Law filed herein on April 26, 1951, appellant intends to rely upon the following points:

A. The evidence shows without conflict, that the following Findings of Fact are not supported by the evidence:

1. Said evidence shows that William Price and Elizabeth Price, prior to November 19, 1928, owned as joint tenants, 575 shares of common stock, and that Elizabeth J. Price owned 191 shares of Series B, 6%, preferred stock, and 88 shares of common stock of defendant Company. Finding II, that prior to said date, William Price was the sole owner of any of this stock, is not supported by the evidence.

2. The evidence shows that both William Price and Elizabeth J. Price were donors, and that the gift was made subject to the express provision that Elizabeth J. Price was to receive and use the dividends until appellant received orders to the contrary. The Findings III and IV that William Price, alone, made the gift referred to, and that it was unqualified, and that said Price merely expected to arrange for all dividends to be paid to and retained and used by Elizabeth J. Price, is contrary to the evidence.

3. The evidence shows that the dividend orders were fully made out when signed by appellee, and that on their face they disclosed to him their purpose and the use to which they were to be put. The evidence does not support the Finding (V) that appellee was requested to sign the dividend orders in blank or that he did not know or understand the purpose for which his signatures were requested, or the use intended to be made of the documents he then signed.

4. The evidence does not show that appellant knew, or had reason to know, that Elizabeth J. Price, alone, would benefit from such payments, and that she would not account to, or pay, or otherwise distribute to George E. Burton, or appellee, any part of such payments—there being no evidence whatsoever to show that appellant knew, or had reason to know, or how Elizabeth J. Price was, in fact, using payments made to her. The Findings in paragraph XII to the contrary effect, are not supported by the evidence.



5. The evidence shows that appellee had abundant opportunity to know, and every reason to know, of his ownership of an interest in stock of appellant Company, and of the nature and purpose and effect and use to be made of the dividend orders signed by him, and of the existence of the assignments made by him of his interest in 575 shares of common stock and of the facts set forth in paragraphs III, VI, IX, X, XI and XII many years prior to March 18, 1944. The Findings of Fact to the contrary (XIII) are not supported by the evidence. Additional Findings of Fact in paragraph XIII of the Findings to the effect that he signed blank dividend orders without knowledge or understanding as to the purpose or effect of his signature, are likewise not supported by the evidence.

6. The evidence does not show any disaffirmance by appellee of the dividend orders. Finding to the contrary (XIV) is not supported by the evidence.

7. The evidence shows that appellee authorized and consented to the payment of dividends to Elizabeth J. Price and after the assignment by him of the 575 shares was not, as against this appellant, an owner of any interest therein or entitled to receive any part of the dividends and stock rights paid and delivered to Elizabeth J. Price. The Findings to the contrary (XVII) are not supported by the evidence.

8. The evidence does not show appellant knew, or had reason to know, that Elizabeth J. Price, alone, would benefit from such payments and performance, and would not account to or pay, or otherwise distribute to either George E. Burton or appellee, any part thereof. The Findings to the contrary (XX) are not supported by the evidence.

9. The evidence shows that appellee had notice of and knowledge of, and authorized and consented to the payment and delivery by appellant to Elizabeth J. Price of the dividends and stock rights referred to in paragraph XIX of the Findings, and that he was not entitled to receive any part thereof until he gave notice to appellant of his desire to receive one-third of such payments. The Findings to the contrary (XXII) are not supported by the evidence.

10. The evidence shows that appellee knew, and had every reason to know, of his interest in 191 shares, Series B, 6% preferred and 88 shares of common stock of appellant Company and of the nature and purpose and effect and use to be made of fully made out dividend orders signed by him. The Findings to the contrary (XXIII) are not supported by the evidence.

11. The evidence does not show any disaffirmance by appellee of the dividend orders referred to in paragraph XXIV of the Findings and the Findings to that effect in said paragraph are not supported by the evidence.

12. The evidence shows that appellee knew, and had reason to know, of the execution of said dividend orders by him, the nature of such documents, and the purpose for which they were to be used from the time he signed the same, and that any disaffirmance thereof by him was therefore not made within a reasonable time after reaching his majority. The Findings to the contrary (XXIV) are not supported by the evidence.

13. The evidence shows that appellant had reason to believe that payment of dividends and stock rights to Elizabeth J. Price were so made by it knowing, and having reason to know, that such payments were being made in accordance with the express terms of conditions attached by the donors of such stock to the three joint tenant donees, and according to the written directions of said three donees. Any Findings, express or implied to the contrary, are not supported by the evidence.

14. That any express or implied Finding, paragraph XXVII, that appellant knew, or had reason to know, of any fraud being practiced upon appellee for any reason whatsoever, is not supported by the evidence.

15. There is no evidence that any fraud was ever practiced upon appellee by either Elizabeth J. Price or George E. Burton, the evidence showing only that appellee was not informed by the donors of the nature of the gift made by them to him, or that if informed thereof, at the time of the trial



he had forgotten that he had been so informed. Any express or implied Finding of Fact to the contrary in paragraph XXVII, or in any other paragraph of said Findings, are not supported by the evidence.

B. The Findings of Fact do not support the Conclusions of Law nor the judgment herein, and the Court made errors of law in not holding that:

1. The execution of the dividend orders and the assignment forms covering the 575 shares of common were not subject as against this appellant to disaffirmance within a reasonable time after reaching his majority.

2. Appellee did not, as a matter of law, make any disaffirmance within a reasonable time after reaching majority of either his execution of the dividend orders, or of the assignment forms covering the 575 shares of common stock.

3. Insofar as appellee continued to be an owner, as joint tenant, of the stock referred to in the complaint herein, Section 1475, Civil Code of the State of California, protects the defendant in the payments it made to Elizabeth J. Price, one of the joint tenants, or such dividends and stock rights for the reason that (1) no fraud was practiced upon appellee, (2) if any such fraud was practiced upon appellee, appellant did not know, or have any reason to know, of such fraud, and had every reason to know that the appellee had consented to the making of such payments to his co-joint tenant.



4. The evidence showing that the gift to the three joint tenants was made subject to the condition, at the time the gift was made, that payments of dividends and stock rights on all of said stock should be made to Elizabeth J. Price until appellant received orders to the contrary from one or all of the joint tenants, it follows, as a matter of law, that such condition operated as a matter of law, as a limitation upon the extent of the gift and that Elizabeth J. Price had the legal right as against this appellant to receive payment of all such dividend and stock rights until appellant was informed by one or all of the joint tenants that it should no longer make all such payments to Elizabeth J. Price.

5. As the evidence shows the assignments were executed in Kansas, the law of Missouri has no bearing whatsoever on the questions of the validity and effect of said assignments. The finding (Conclusion of Law III) that plaintiff executed the assignments in Missouri is not supported by the evidence.

It follows that appellant was entitled to judgment.

October 23, 1951.

FULCHER & WYNN,  
By /s/ CAROL G. WYNN,  
Attorneys for Appellant.

[Endorsed]: Filed October 27, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION RE PREPARATION OF  
TRANSCRIPT OF RECORD ON APPEAL

It is hereby stipulated by and between the parties hereto through their respective attorneys of record the undersigned as follows:

That whereas appellant has designated for inclusion in the transcript of record plaintiff's exhibits Nos. 1 to 7 inclusive, being certificates of stock issued by appellant corporation covering 575 shares of common stock, together with stock assignment forms attached, it is hereby stipulated that in the preparation of the transcript of record only plaintiff's exhibit 1 need be printed in full showing all notations appearing on the front and back of said assignment (including power of attorney) form. As to said exhibits 2 and 7 inclusive, it is hereby stipulated that said exhibits are identical with said exhibit No. 1, save and except as to number of shares designated in each such certificate and assignment form and other immaterial matters.

It is further stipulated that whereas it is anticipated that appellee may designate for inclusion in said transcript plaintiff's exhibits Nos. 14 and 20, that No. 14 if so designated, may be included by reference only as being identical to Exhibits A, B, C and D which are attached to and made a part of Findings of Fact and Conclusions of Law of the trial court in the action here on appeal. As to exhibit No. 20, being three resolutions passed by di-

rectors of appellant corporation on January 25, 1929, December 27, 1929, and December 19, 1930, respectively, if so designated, it is stipulated that only the resolution of January 25, 1929, need be printed in full and that as to the remaining two resolutions it is stipulated they contain the same language as to notice to stockholders and the representation of stock rights by warrants to be issued in the name of the stockholder and subject to endorsement by said stockholder as is contained in said resolution adopted January 25, 1929.

Dated October 24, 1951.

THURMAN L. McCORMICK,  
HAROLD EASTON,  
By /s/ HAROLD EASTON,  
Attorneys for Appellee.

FULCHER & WYNN,  
By /s/ CAROL G. WYNN,  
Attorneys for Appellant.

So Ordered.

/s/ WM. DENMAN,  
Chief Judge.  
/s/ HOMER T. BONE,  
/s/ WM. E. ORR,

United States Circuit Judges.

[Endorsed]: Filed October 30, 1951.











